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FORMS OF WRITINGS
USED IN SCOTLAND,

IN THE MOST COMMON CASES;

WITH

THE PRINCIPLES OF THE LAW
CONNECTED THEREWITH.

AND A

TABLE OF STAMP DUTIES.

AS ALSO, THE FORM OF
SUMMARY APPLICATION TO JUDGES,

IN A VARIETY OF CASES;

WITH OBSERVATIONS

ON THE FORM OF PROCEEDINGS
BEFORE INFERIOR COURTS.

TO WHICH IS ADDED,

A TABLE OF FEES.

IN A MANNER SO PLAIN AND SIMPLE, AS NOT TO RE-
QUIRE ANY PREVIOUS PRACTICE IN THE LAW.

By ANTHONY MACMILLAN.

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P R E-

P R E F A C E.

DIVINITY, Law, or Physic, are not properly the study of one man, or body of men, but of all men, to a certain extent ; and to that extent ignorance is culpable. Common sense, with proper helps, is capable of much ; and seldom betrays us, if we do not betray it. But it is certainly inconsistent to give the practitioners *in the trade of the law*, the entire direction of our judgment in it, and to blame the Roman catholic for trusting the keeping of his conscience to his priest. It is as bad an excuse in the one as in the other to say, I never thought of it ; I left that to those who live by it : For the

client is answerable for whatever is urged by his Procurator, Agent, or Counsel; and for the effect of every word the writer he employs may use in a Deed. There is no law, however, to hinder any person who has sufficient confidence in his abilities to appear and draw all the papers in his own cause *, and to write every deed he has occasion to make.—The law is a science, in the knowledge of which every person is interested; it is the security on which depend his fortune—his liberty—his character—his life. Legislators, in enacting laws, have addressed them to all. Judges in determining causes, and lawyers in pleading upon them, have paid every class

* By act of parliament 1537, § 51. “ It is devised and ordained, That na man enter to pley
 “ bot parties conteined in their summoundes, and
 “ their procuratoures, *gif they will ony have.*”

class of men the compliment to suppose they knew the laws, the practice, and the forms. This, however, has not always added to their happiness, particularly when, after a question in law, or the effect of a clause in a writing, had been long debated, a party was found liable in costs; because he was presumed to have known the law; and *ignorantia juris neminem excusat*. In the following Treatise, first begging pardon for differing from such great authorities, I shall take quite a different course, and go upon the supposition that men in general, not bred to the law, know nothing about it; or at least very little. Indeed the method in which the writers on the law have treated it, is unfavourable to the acquiring any knowledge of it. Naked principles are a dry study, until, by practice, the mind is stored with cases and forms; and bare forms

or stiles, without principles, are equally bad. Add to this, they all presuppose a considerable degree of knowledge in it. There are no rudiments in it ; nor is there any grammar or dictionary. It is like a great stair-case wanting the first steps. I have inquired out every book that appeared to have a tendency to supply this defect, and have long waited in expectation that some person possessed of knowledge and experience sufficient for the task would undertake it : But, as nobody appears to think of it, I have at last attempted to give some notion of a few of the most simple and common stiles and principles ; in so far as the same can be contained in so small a volume as to carry in one's pocket. I do not pretend to say I have nearly included all the most common principles : I have only introduced such as appeared connected with the other parts of the work ;

work ; but these relished and understood, will render the study of the rest more easy and agreeable. And considering that the stamp duties necessary to be known and used, are become so numerous, imposed by so many different acts, and varying so much according to circumstances, as hardly to be retained in the memory of a Professional Gentleman ; in order to render this work the more completely useful, I have annexed a Table of such of them as are used in a Writer's practice, with a few others. If my abilities and opportunities had been greater, it should have given me a sensible pleasure in being more serviceable to the world ; but they may rest assured my wishes to serve them could not have been greater ; and, certainly, he who has a little knowledge, and is willing to communicate it, deserves better of mankind than he who is possessed

fed

fed of the most profound knowledge and erudition, but who hoards it up in his own breast while he lives, and when he dies has it buried with him.

To

TO THE READER.

A RUDE draught, or first sketch, of this book was published in the year 1784, with this Title-page, "FORMS
" *of WRITINGS used in the most common*
" *cases in Scotland; with such part of the*
" *PRINCIPLES of the LAW as appear con-*
" *nected therewith—In a manner so plain*
" *and simple, as not to require any previous*
" *practice in the Law for using them. To*
" *which is added, A TABLE of STAMP*
" *DUTIES,*" &c. The original manuscript was very hastily written; and besides, being the first thing of the kind, could not be expected to be highly finished or perfect, in a first edition; but the great demand for it has induced the Author since to bestow a little more pains on it:
And

And he has now, to render it more complete, added a few more observations on the law, and short introductions to some of the titles, on the origin and progress of the matters therein contained.—As to the Forms, he has found nothing to alter. When the manuscript for the first edition was shown to the Bookseller, there was no more of it than the first thirteen titles thereof; and, on his observing that it would make too small a volume, the title on Feu-contracts, &c. was afterwards added, in the order in which it stood in that edition. The Author thought a different arrangement as to this title proper, by which all the forms of written deeds might be found together, and that the Table of Stamp Duties fell most properly to come in after these deeds, most of them being liable to these duties; and that the Forms of Applications to Judges, both ordinary and

and extraordinary, should with greater propriety be placed by themselves. As the Author, however, meant, on every occasion, to give all the information he could on every subject introduced, he has among these applications inserted the forms of several bonds of caution, &c. as accessory obligations, or relative writings; and as he had, in the first edition, given very full excerpts from the British statutes made within these few years last past, but had given a much shorter account of several of these statutes of an older date, he judged it proper, in this edition, to be equally full on these older statutes. Having thus accounted for any alterations he has used the freedom to make, he again submits it with gratitude to the candour of the Public.

TITLE

T I T L E I.

Missives, Agreements, and Minutes of Sale.

AS, among trading people, a variety of transactions take place, and writings are thereupon used, which it might sometimes be inconvenient to find men bred to the law to form, they have, by the usage of Scotland, been frequently sustained, though without some of the formalities requisite to common deeds. Thus missive letters, in mercantile affairs, are valid, though not holograph, (*i. e.* written by the persons who sign them) and though wanting witnesses: But, in affairs not strictly mercantile, they are not valid, if not holograph. The proper method, therefore,

A

fore,

fore, in cases not mercantile, is, one of the parties to write a letter with his own hand, containing the obligations he means to come under, and as much of the other parts of the transaction as to make it understood; and the other party to write out another in the same manner, containing the obligations he means to come under: And the two letters may refer each to the other by their dates. Where the parties have not been so well educated as to be capable of writing such letters themselves, or, in other words, to make them holograph, though they can possibly sign their names, it would appear, that adding the ordinary subscription clause, containing date, writer, and witnesses names and designations, in order to supply that defect, would be deviating too much from the nature of missives to be obligatory. Though, from a principle of law, that

‘ an

'an obligation to grant a deed is equal to
'the deed itself,' strangely misunderstood,
it has been a frequent practice among
country people to write on paper not
stamped, a kind of articles, or minutes of
agreement, relating to their bargains,
much in the stile of an ill framed deed,
written on stamped paper, by a bungling
writer, only leaving out the registration
clause, and, instead of it, obliging them-
selves to extend the same on stamped pa-
per, when required; and ending with
the common subscription clause: Yet,
it would appear, that even an agreement
to enter into an obligation, or make a
conveyance, in a formal manner, when re-
quired, cannot be made so as to be bind-
ing, without the legal solemnities, more
than the deed itself agreed to be entered
into, or made, if it is not done by holo-
graph missives. Thus, by a decision of

the Court of Session, 19th February 1778, it was found, that a minute of sale must be written on stamped paper. But they were in use to be written upon it long before. Indeed, in the case of a minute of sale of lands, where the person obliging himself to make the conveyance, has not got proper titles made up to the subject fold; and the conveyance cannot be made properly till such be the case, the propriety of such obligation to convey, in a full and ample manner, is obvious; though it should be attended with the trouble and expence of getting it executed on stamped paper, with all the requisite solemnities, if the persons concerned cannot write proper holograph missives to answer the end. For further satisfaction upon this article, I have inserted the following decision, which is taken
notice

notice of in the late Institute of the law of Scotland by Mr Erskine.

‘ In a case, *Mackenzie and Lawson contra Park*, November 15. 1764, one of the parties having wrote and subscribed an offer to purchase an heritable subject from the other, upon certain terms, and the other having subscribed a written acceptance, and likewise subscribed the offer, but neither of which was holograph of him, or formally attested, though there were witnesses present at signing; and this party having afterwards refiled, the Court of Session, in a process against him for implement, found the missive and acceptance not probative, and therefore assoilzied the defender; and this although he did not deny the subscription; as the court thought that writing was essential, and that the want of legal solemnities could not be supplied

‘by his acknowledgement.’—A similar judgment was given in the case of *Bisset contra Stewart*, in 1765.

Wherever there is a doubt of the writings not being effectual, payment of a part of the price will create a valid obligation, and put it out of the power of any of the parties to draw back; and would do it even though there were no writing. Or, where any thing is done by either party, whereby matters are not entire, and each cannot be put in his former situation, it has the same effect. As to minutes of tack, see *Tacks*, where they are taken notice of. It may likewise be necessary to observe, that holograph writings of no kind (except bills of exchange) prove their being of the dates they bear, in a dispute with creditors or heirs; but of whatever date they may happen to be, in a dispute with a creditor, they are presumed

med to have been made within sixty days of the granter's bankruptcy; or, in a dispute with the granter's heir, to have been upon deathbed; or by an arrester, to have been granted after arrestments used: In all which cases, they must be supported by evidence as to their dates. It seems (as above observed) rather foreign to the nature of missives to end with the witnesses names and designations; and without that, the being signed by them, as witnesses, could be of no effect*: Though, to be able to prove them of the date they bear, it would not be amiss that witnesses were present when such holograph missives were signed, and that they made a memorandum of it, in case the date should afterwards be disputed. Holograph writings also prescribe,

if

* Act parl. 1579, c. 80.

if no document be taken upon them in twenty years.

Having premised so much, I shall add a form of missives, and of a minute of sale, which, though no particular form can answer in every case, may serve for the plan and arrangement.

Copy Missives between the Seller and Purchaser of a Wood.

D—— 12th June 1782.

S I R,

I hereby make you an offer of all the growing timber, with the bark thereon, growing in the farm of C. in the parish of T. with liberty to char what wood you please, and cover for the same within the wood; allowing you three years from this date to cut the same, and till Martin-
mas

mas thereafter to clean the hags; and agree that you shall have the most convenient roads to take away the timber, bark, and charcoal; you paying me one hundred pounds Sterling as the price thereof, at the term of Whitsunday one thousand seven hundred and eighty-three years. If you agree to these terms, you will signify the same by letter.

I am,

S I R,

Your most obedient humble servant,

A. B—,

To Mr C. D. Merchant in E.

If the lands are not in the seller's natural possession, but possessed by tenants, the following clause may be necessary, after the word *years*, at the end of the obligation for payment: ' And paying such damages to the tenant as it shall be found he
' has

‘ has sustained, by the verdict of two men
 ‘ to be mutually chosen for that purpose.’

E—— 12th June 1782.

S I R,

I received your's of this date, making me an offer of the growing timber and bark of the farm of C. on paying one hundred pounds as the price thereof against Whitsunday one thousand seven hundred and eighty-three years, which offer I hereby accept-of, and agree to the whole proposals therein contained, in all points, and am,

S I R,

your most obedient humble servant,

C—— D——.

To A. B. Esq; of C.

If the before-mentioned clause is put in the first missive, it should be repeated in the last also, after the word *years*.

Copy

*Copy Missives betwixt the Seller and
Purchaser of a Freehold Qualifica-
tion.*

S I R,

I hereby acknowledge to have sold you the superiority of my lands of A: lying in the parish of B. and county of C. with all the casualties belonging thereto, and all right I have to the same, from this date, for which you have engaged to pay me one hundred pounds Sterling at Martinmas first, and I will, on demand, grant you a valid disposition to the same, and deliver therewith a proper progress of writs; and I hereby engage that the sale now made shall be the foundation of a sufficient qualification for enabling you, or your assignees, to vote in the election of a member of parliament for the county of C——. Otherwise, and in case of its being found not to give such a qualification,

cation, I will not demand payment of the price; or, if I shall have received it, I will repeat and pay it back on demand, you, however, making no demand upon me for any expences you may be at in taking out a charter and trying to make the vote effectual. And it is agreed, that I and my heirs are to pay you a yearly feu-duty of sixpence Sterling, holding the said lands of and under you for payment thereof, beginning the first term's payment of the said feu-duty at Whitsunday one thousand seven hundred and eighty-three, and yearly thereafter, and doubling the said feu-duty the first year of the entry of every heir or singular successor to me therein.

I am,

S I R,

your most obedient servant,

SIMON SELLOUT.

To Mr Peter Politic Merchant Edinburgh.

Edinburgh,

Edinburgh, 5th Feb. 1782.

S I R,

As you have sold me the superiority of the lands of A. lying in the parish of B. and county of C. I hereby promise and engage to pay you one hundred pounds Sterling for the same, at Martinmas first. But, in case the superiority of the said lands shall not entitle me to a sufficient qualification for voting in the election of a member of Parliament for the county of C. I am either not to pay, or if paid, to draw back from you the said price, and to reconvey to you the said superiority.

I am,

S I R,

your most humble servant,

PETER POLITIC.

To Simon Sellout, Esq; of Hindmoston.

B

Minute

Minute of Sale of Lands.

It is contracted, agreed, and ended, betwixt A. B. of C. Esq; on the one part, and E. F. merchant in G. on the other part, in manner following; that is to say, the said A. B. has sold and disposed, and by these presents (for payment of the price underwritten) sells and disposes, to and in favour of the said E. F. his heirs and assignees, heritably and irredeemably, all and whole, &c. (here take in the lands as described in the last disposition or infestment,) together with all right, title, interest, claim of right, property, and possession, petitory, or possessory, which the said A. B. his authors and predecessors, heirs and successors, had, have, or may have claim, or pretend thereto, in all time coming; of the which lands and
other

others foresaid, the said A. B. binds and obliges him, his heirs and successors, to make, grant, subscribe, and deliver to the said E. F. a valid and formal disposition, containing obligation to invest, procuratory of resignation, clause of absolute warrandice, assignation to the writs and evidents, and to the rents, mails, and duties, from and after the term of Whitsunday last, which is hereby declared to be the time of the said E. F.'s entry thereto, with all other clauses usual and necessary; and, with the said disposition, to deliver a complete progress of the writs of the said lands and others foresaid. *And further,* the said A. B. binds and obliges himself and his forebears, to free, disburden, and relieve the same, of all debts and incumbrances any manner of way affecting them; and of all teinds, cesses, taxations, and other public burdens and im-

positions whatever, affecting the same, or any ways due, and payable forth thereof, at, and preceding the said term of Whitsunday last : *For which causes, and on the other part,* the said E. F. has instantly paid unto the said A. B. the sum of fifty pounds Sterling, and binds and obliges him, his heirs, executors, and successors, to pay to the said A. B. his heirs, executors, or assignees, the sum of four hundred and fifty pounds Sterling, and that at the term of Martinmas next, with annualrent of the said principal sum yearly, termly, and proportionally, after the said term of payment, during the not payment of the same : *And both parties* bind and oblige themselves to perform, implement, and fulfil the premises to each other, under the penalty of one hundred pounds Sterling, to be paid by the party failing to the party observing, or willing

to

to observe, over and above performance;
and they consent to the registration hereof
 in the books of Council and Session, or
 others competent, that letters of horning,
 on six days charge, and all other execu-
 tion necessary in form, as effeirs, pass
 hereon; and thereto constitute

their procurators, &c.

In witness whereof, these presents, (writ-
 ten upon this and the two preceding pa-
 ges of stamped paper, by W. S. School-
 master at B.) are subscribed by the said
 parties at N——y, the eighth day of Fe-
 bruary, one thousand seven hundred and
 eighty-two years, before these witnesses,
 Q—M'C—labourer, and W—H—wea-
 ver there.

Q—M'C—witness.

A——B——

W—H—witness

E——F——

The parties must sign all the pages, the witnesses only sign the last. The blank near the end, after the word 'constitute,' is not intended to be filled up before or at signing, but is left for the person's name who presents it for registration, and is not filled up till then. Each page must be marked by its number at the head, as *first, second, &c.* and the subscription clause must mention the number of pages.

Minutes of sale, or other agreements, executed with all the legal solemnities, differ from missives in this, that, on the former, diligence by horning, &c. may be instantly obtained; whereas action must be raised on the latter, and decret obtained, before diligence can be raised; but in which action the missive will be sufficient proof of the obligation or agreement of parties.

The act, 23d Geo. III. granting to his
Majesty

Majesty several additional and new stamp duties, puts the necessity of stamped paper to agreements beyond a doubt. By a clause in that act, all parchment, or paper, upon which any agreement is written, or printed, whether the same be only the evidence of the contract, or obligatory upon the parties, from its being a written instrument, is charged with a stamp-duty of 6 s. But it is provided, that nothing in this act contained, shall extend to charge any memorandum or agreement, made in that part of Great Britain called *Scotland*, that shall be stamped with the duty required on deeds in that part of Great Britain called *Scotland*: And, by the former acts, with the additional duty imposed by said act, 23d Geo. III. required in *Scotland*, the duty on deeds, in general, not otherwise charged, is only 5 s. But although, in the exceptions
from

from the duty of 6 s. on agreements, those for sums under L. 20 are excepted; yet, as that exception precedes the one with regard to deeds in Scotland, which appear from the provision in the act to be left exactly in their former situation; and, as sums above L. 100 Scots, (or L. 8 : 6 : 8 Sterling), were always considered as deeds, and therefore liable, this exception does not seem to apply to them.

When stamped paper cannot conveniently be got, although the matter be of the greatest importance, there is a way by which it is thought an agreement or contract, and with a trifling variation, any obligation whatever, may be made out without it, particularly when it is an obligation or agreement to make a conveyance, and only to serve till matters be got ready for making out the proper writing,

tin
for
per
fubl
clau
felve
putt
' fail
' of
' den
' stat
' ting
' law,
12mo
parch
be ava
ceipt

* W
an oblig
to imp
obliges

ting, and that is, to write it out in the form used when written on stamped paper, with a clause of registration and of subscription; only, immediately before the clause whereby both parties oblige themselves to performance, under a penalty, putting in this clause, ‘ And either party
‘ failing, or refusing to implement his part
‘ of the premises, obliges himself to in-
‘ demnify and repay to the other party
‘ statutable penalty, and expences of get-
‘ ting these presents stamped, conform to
‘ law, if laid out by him *.’ As, by act
12^{mo} Ann. § 25. no deed written upon parchment, or paper, not stamped, shall be available till it be stamped, and a receipt produced for L. 5, paid to the
crown,

* Where the above clause is to be put into an obligation, ‘ and in case of failzie or refusal, to implement the above obligation, the said—
‘ obliges himself,’ &c.

crown, over and above the stamp duties ; so, upon getting it stamped, and a receipt for that sum, diligence may be raised upon such deeds for performance ; and, upon the clause above mentioned, the diligence will be effectual for recovering these sums of expences of procuring it stamped. And this act is not repealed by any of the latter acts imposing additional duties. At the words ('written upon this ' and the ——— preceding pages of stamped paper,') the word *stamped* in this case may be left out.

T I T.

T I T. II.

*Tacks, Assignations thereto, Subtacks,
&c.*

IT is almost unnecessary to define a tack to be a contract, whereby the use of a thing is let by the proprietor to another person, for a certain hire; but it may be proper to observe, that it must have an *issu*, (or term when it is to expire,) otherwise, being too much of the nature of a sale, with a certain yearly return, it will not be sustained when the lands come into the hands of a different proprietor from the granter and his heirs; who cannot be obliged to take the lands clogged with perpetual

perpetual burdens upon the use of them, not followed by infestment; or to be found by searching the records for incumbrances. Where, therefore, tacks are granted for a yearly hire, or tack-duty, so trifling that it appears perfectly elusory, or for a term in effect equal to perpetuity, they will not be effectual against other proprietors than the granter and his heirs. Indeed, fifty-seven, or three nineteen years, seems to be a sufficient time of endurance, though there is no law fixing them particularly to that, and they have been sustained for a much longer space of time.

Tack.

IT is agreed, and by way of tack, *finally ended*, betwixt the parties following,
viz.

viz. A. B. Esq; of C——, heritable proprietor of the lands and others underwritten, *on the one part*, and D. E—— in F——, *on the other part*, in manner after mentioned; *that is to say*, the said A. B. has *set*, and hereby *sets*, and in tack and assedation, *lets*, to the said D. E. his heirs and successors, (secluding assignees and subtenants, without consent of the said A. B.) *all and whole* the lands of —— presently possessed by —— lying in the parish of —— and shire of —— and that for the space of nineteen years after the term of Whitsunday next, hereby declared to be the term of the said D. E.'s entry to the said tack, to be peaceably possessed and enjoyed by him, and his forefaids, during the said space; which tack the said A. B. binds and obliges him, his heirs, and successors, to warrant to the said D. E. at all hands. *For which causes, and on the other*

C

part,

part, the said D. E. binds and obliges himself, his heirs, executors, and successors, to make payment to the said A. B. his heirs or assignees, of the sum of ——— pounds Sterling of tack duty yearly, at two terms in the year, Martinmas and Whitfunday, by equal portions, beginning the first term's payment thereof at the term of Martinmas next, for the half year immediately preceding, and so forth termly thereafter during this tack, with ——— pounds Sterling of penalty and liquidate expences for each term's failzie*. *And both* parties bind and oblige themselves, and their foresaids, to perform, implement, and fulfil their respective parts of the premisses to each other, under the
penalty

- * Sometimes the following clause is added:
 ' And, at the expiry thereof, to flit and remove
 ' himself and his foresaids without any warning,
 ' process, or action whatever.'

penalty of — pounds Sterling, to be paid by the party failing to the party observing, or willing to observe the same, by and attour performance; *and they consent* to the registration, &c. (as in minute of sale.)

The termly penalty is generally one fifth part of the yearly rent, the mutual penalty in the clause of performance a year's rent.

Assignment to a Tack.

It will be observed, that the above tack can neither be sublet nor assigned without the master's consent; nay, suppose there was no clause secluding assignees, it is doubted if it could be assigned without the master's consent, unless it expressly

ly bore to 'heirs *and assignees*;' which seems a little hard, as an assignation does not free the person who assigns from the obligations he comes under by the principal tack. A liferent tack may, indeed, be assigned, if they are not expressly secluded.

As assignations to tacks nevertheless sometimes occur, I have added a specimen.

BE *it known* to all men by these presents, That I D. E. in F—— *Whereas*, by tack dated the —— day of —— one thousand seven hundred and —— years, entered into betwixt A. B. of C—— Esq; and me the said D. E. the said A. B. set, and in tack and assignation let, to me, my heirs and assignees, *all and whole* the lands of —— lying in the parish of —— and shire of —— for the space of nineteen years

years from and after Whitsunday one thousand seven hundred and — years, for which I stand bound to pay him, his heirs and assignees, the sum of fifty pounds Sterling yearly of tack-duty, during the said tack, at the two terms in the year therein mentioned, beginning the first term's payment thereof at Martinmas then next, for the half year preceding, and so forth termly thereafter, during the said space; which tack contains several other clauses and conditions. *And seeing* G. H. in J. has made payment to me of a certain sum of money for granting these presents; *therefore have made, constituted, and ordained, as I hereby make, constitute, and ordain* the said G. H. his heirs and successors, my lawful cessioners and assignees, in and to the said tack, during the whole years and term thereof to run, and to all clauses and obligations therein contained,

tained, profits that may arise therefrom, and to all action and execution competent thereon, with power to the said G. H. to occupy and possess the said lands during the whole years and space mentioned in the said tack, and yet to run, they paying the tack-duty therein contained to the said A. B. Esq; at the terms therein expressed, and also to use the said tack in the same manner, and as freely, in all respects, as I might have done myself before making this assignation : Which tack I oblige me to warrant to the said G. H. from my own fact and deed allenary, done or to be done, in prejudice hereof (a). And having herewith delivered up to the said G. H. my duplicate of the said tack, to be kept and used by him as his own proper evident in time coming, I *consent* to the registration hereof in the books of council and session, or others competent, therein

therein to remain for preservation, and, if needful, that all execution necessary, in form as effeirs, pass hereon; and thereto constitute

my procurators, &c. In witness, &c.

If there is a part of the space of the tack run, it may be necessary to mention the time of the assignee's entry, and put in the following clause at letter *a*, 'and to clear and pay all tack duties due for the said possession, preceding the said G. H. his entry thereto.' As the assignee is liable for the arrears of rent, if any are due by the principal tacksmen, coming by the assignation in his place; consequently, under all his obligations to the master, though, as above observed, he does not free the assigner.

Possession upon assignations of this kind supplies the place of intimation in other assignations.

Sub

Sub-Tack.

IT is thought a tacksman may sublet, even where assignees are excluded, if sub-tenants are not also excluded; though it seems not quite certain. There was a decision of the Court of Session to that effect; the matter was brought into court since, but did not go the length of a decision; but it is most likely, if it had, they would have given it as before.

The sub-tenant is only liable to the principal tacksman, who cannot by renouncing hurt him. The principal tacksman alone is liable to the master. Where either a part only is set, or a greater sum paid yearly by the sub-tenant than the yearly rent in the original tack, a sub-tack is ordinarily executed: The form of which is as follows;

IT

IT is agreed, and by way of sub-tack, ended, between A. F. merchant in A—— and J. W. residenter in A—— *of the one and other parts*, as follows: That is to say, the said A. F. has *set*, and hereby *sets*, and in sub-tack and assedation *lets*, to the said J. W. his heirs, assignees, or sub-tenants, *all and whole, &c.* (here insert what is to be subset) and that for the space of ——— years from the term of Whitsunday next, with power to him, and his forefaids, duly to labour, occupy, and possess the same, in the same manner as the said A. F. might have done by his tack thereof; which sub-tack the said A. F. binds and obliges him, his heirs and successors, to warrant to the said J. W. at all hands: *For which causes*, and on the other part, the said J. W. binds and obliges him, his heirs and successors, to pay to the said A. F. his heirs or assignees,
the

the sum of fifteen pounds Sterling of yearly rent, at two terms in the year, Martinmas and Whitsunday, by equal portions, beginning the first half year's payment at Martinmas next for the half year preceding, and so on half yearly thereafter, during the said space, with — of penalty and liquidate expences for each term's failzie; and both parties oblige themselves to perform the premisses to each other, under the penalty of — pounds Sterling, to be paid by the party failzier to the party observer, or willing to observe the same, attour performance; *consenting* to the registration, &c. (as in minute of sale).

Articles

Articles of Roup of a Tack and Stock.

WHERE the same person is proprietor both of the land and stock upon it, it is usual to set a particular rent upon the land, in articles of roup of the stock; the purchaser of the stock at the roup being obliged to become tenant, and pay that rent. If the rent is fixed above the real value, the stock goes below it, which is an encouragement to an industrious person of small fortune. If the rent is below the real value, it suits a moneyed man to secure his money on and live easily, having a small rent to pay, and producing almost every thing he stands in need of, without going to the market.

Roups of this kind do not fall within the act of 17th of his present Majesty, imposing

posing certain duties on things sold by auction, as amended by that of the 19th.

Articles and conditions of the roup and sale of the stock and tack of the lands of M——, lying in the parish of —— and shire of ——, whereof A. B. of C. Esq; is proprietor.

Primo, The said stock and tack shall be exposed to sale, by way of public roup, within the house of J—— O——, inn-keeper in C——, upon the twenty-first day of ——, one thousand seven hundred and eighty-three years, between the hours of one and two afternoon, during the space of half an hour upon the watch of G. H. of L. who is hereby appointed judge to the roup.

Secundo,

Secundo, The stock of sheep, old and young, lambs included, upon the said lands, is to be set up at six pounds Sterling per score, counting twenty one to each score, as the same shall number upon the day of delivery after mentioned, or when gathered together, straying on the ground, or upon the neighbouring grounds; and the person or persons offering the said sum, or, in case of higher offers, the person or persons making the highest offer, shall be preferred to the purchase.

Tertio, In case of more offerers than one, every after offerer shall exceed the preceding one in half-a-crown at least, upon each score of the said sheep.

Quarto, That each offerer shall subscribe his offer, and be thereby bound, in terms of the above and following articles, and consign in the hands of the clerk to the group, one guinea of bidding money, which

D

is

is to be returned to all, except the last and highest offerer, and not to be accounted any part of the price.

Quinto, That the person or persons who shall be preferred to the purchase of the said stock, shall, upon his or their finding caution for payment of the price thereof, in manner after mentioned, be entitled to the possession of the said lands of M. for the space of nineteen years from and after Whitsunday next, at the yearly rent of one hundred pounds Sterling, payable at two terms in the year, Martinmas and Whitsunday, by equal portions, beginning the first term's payment thereof at Martinmas one thousand seven hundred and eighty-two years, for the half year immediately preceding, and so forth yearly and termly during the tack, under a termly penalty of ten pounds Sterling in case of failzie.

Sexto, That the purchaser shall, within fourteen days after the roup, find sufficient caution, to the satisfaction of the said A. B. for the payment of the price of the said stock of sheep (a) at the terms following, viz. Two hundred pounds Sterling thereof at the term of Lammas first, and the remainder of the price at Candlemas one thousand seven hundred and eighty-three, with annual rent thereof after these terms, and one-fifth part more of penalty, in case of failzie.

Septimo, In case of more offerers than one, and that the last and highest offerer, and who shall be preferred to the purchase, shall fail to find such caution within the space foresaid, then, and in that case, he shall, in the option of the exposer, not only lose the benefit of the purchase, but also forfeit a fifth part of the price offered by him, which shall be paid to the said A. B.

and the benefit of the purchase shall fall to the preceding offerer, who shall be bound to accept thereof at the price offered by him, and to find caution for payment of the said price to the said A. B. at the terms, and bearing interest and penalty, as above mentioned, within fourteen days after the failzie of the last and highest offerer shall be intimated to him, otherwise shall forfeit and pay in the same manner and terms as are stipulated in the event of the failzie of the said last and highest offerer, and so backwards through the whole course of the preceding offerers, until these articles shall be fully implemented.

Octavo, That, upon finding such caution as aforesaid, the said A. B. shall grant a tack of the foresaid lands, for nineteen years from Whitsunday next, at the above mentioned rent of one hundred pounds Sterling

Sterling yearly; by which tack the purchaser and tenant shall be obliged to free and relieve the said A. B. of all stipend, school-salary, land-tax, and every other burden imposed, or that may be imposed on the lands during the tack, and that over and above the said sum of one hundred pounds of rent: And the tenant shall, at the said term of Whitsunday, get delivery of the said stock, and receive all the houses, (except the barn), and an estimation of the repairs necessary shall be then made, and the amount thereof allowed out of the first year's rent; and the tenant shall be bound not only to lay out the same in reparations thereon, but also to maintain and uphold the said houses in a sufficient condition during the tack, and to leave them so at his removal; and further, the tenant shall have liberty to sublet or assign during his tack, he always

continuing bound for the rent, unless the said A. B. shall consent to free him thereof.

Ultimo, In case any difference or question arise concerning the said roup, and the execution of these articles, whether among the offerers themselves, or betwixt the purchasers and exposers, the same shall be instantly determined by the said G. H. judge to the roup, whose determination, by any sentence adjected hereto, shall be final and binding on all parties concerned; and the last and highest offerer shall enact, bind, and oblige himself to implement the whole articles of roup, as incumbent upon him, under the penalty of one hundred pounds Sterling, attour performance. And the said A. B. and the several offerers subscribing their offers, consent to the registration hereof, and of the minutes of roup and enactment to follow

follow hereon, in the books of council and session, or others competent, that letters of horning, on six days charge, and other execution necessary, in form as effects, may pass hereon, and constitute

their procurators. In witness whereof, these presents, written upon this and the — preceding pages of stamped paper, by T. S. writer in —, are subscribed by the said A. B. at M—— aforesaid, the fourteenth day of March one thousand seven hundred and eighty-two years, before these witnesses, R. S. and T. V. both his servants.

R— S— witness. A. B—
T— V— witness.

Within the house of J— O— inn-keeper in C— the twenty-first day of March, one thousand seven hundred and

and eighty-two years. The articles of roup being read to the company, in presence of the judge,

Compeared

J——s M——k in K——, who offers six pounds *per* score for the said sheep, in terms of the articles of roup.

J——s M——k.

W—— S—— in —— who offers six pounds two shillings and sixpence *per* score for the said sheep, in terms of the articles of roup.

W—— S——

The said W. S. being the last and highest offerer for the said stock, at the expiry of the said half hour, at six pounds two shillings and sixpence Sterling *per* score, the judge prefers him to the purchase; and the said W—— S—— enacts, binds,

binds, and obliges himself to pay the said price, and to perform and fulfil the whole articles of roup, as incumbent on him, under the foresaid penalty of one hundred pounds Sterling, by and attour performance of the whole articles. In witness whereof, this enactment is written by the said T. S. clerk to the roup, and signed by the said judge, purchaser, and clerk, at M——— afore said, the twenty-first day of March one thousand seven hundred and eighty-two years, before these witnesses A. D. tenant in E. and E. F. tenant in G.

G—— H——

A. D. witness.

W. S——

E. F. witness.

T— S— clerk.

If the roup be made by a *principal tackfman*, he is mentioned as such, instead of *proprietor*, as in the foregoing.

In

In case there are black cattle and horses, there may be put in an article betwixt *Quinto* and *Sexto*, "That the purchaser shall be entitled to, and obliged to receive, along with the said stock of sheep, ten milk kine, with their calves and followers, and a bull, at four pounds Sterling, and three horses at eight pounds Sterling *per* horse." By calling this *Sexto*, or 6th article, the next will be *Septimo*, the following *Octavo*, the one after *Nono*. In the beginning of 6th Article, at letter (a), after the words *stock of sheep*, add *black cattle and horses*.

As missives of set (*acknowledging to have set, &c. for which the tenant is to pay, &c.*) containing all the substantial parts of a tack, if followed by possession, are of the same force with formal tacks, it will scarcely be necessary to add a form of one, in consequence of the above articles

of

of roup, where the stock only is roused, and the rent and terms of payment of it so particularly mentioned, only the articles of roup ought regularly to be written on stamped paper; and if the articles are not, nor are very formally made out, and it is thought necessary to have a tack extended, it is almost needless in such a tack to take any notice of them. Indeed, all the alteration in a form of a tack, in consequence of articles of roup, would be inserting a narrative in the following manner.

Tack in consequence of Articles of Roup.

It is *agreed* and *ended* between the parties following, viz. A. B. of C. Esq; and W. S. in T. *of the one and other parts*, in manner under-written: That is to say,
Whereas,

Whereas, in consequence of articles of roup, dated the fourteenth day of March last, signed by the said A. B. he did, upon the twenty-first day of said month of March, expose to public roup and sale, the stock and tack of his lands of — as presently possessed by — and obliged himself to enter into a tack with the person or persons who should be preferred to the purchase, for the space, and on the terms therein and after mentioned; at which roup the said W. S. being the last and highest offerer, he was by the judge to the roup preferred to the purchase, and enacted and obliged himself to perform the whole of the said articles, as the said articles of roup, minutes thereon, and enactment by the said W. S. more fully bear. *Therefore* the said J. C. Esq; in implement of his part of the said articles, hereby sets, and in tack and assignation,

dation, &c. (Here take in the master's part, and say) *for which causes, and on the other part, and in implement of his part of the said articles, the said W. S. &c.*

It will be expected, that I should here say something relating to assignments of stocks. The general practice is; that, when a tenant removes, he sells the stock, and delivers it before a great concourse of people as witnesses, without any written form of conveyance. Writers are, indeed, often employed to make out assignments to stock, in security of sums for which persons have been bound for tenants, sometimes for the original price of the stock itself; but they are generally intended to be kept secret, and the tenant allowed to keep the stock on the ground; in which case they are not good in a dispute with creditors, as being

E

retenta

retenta possessione; for, according to Mr Erskine, ‘Assignments of moveable subjects, though they be intimated, if they be made *retenta possessione*, (i. e. the person who makes the assignation retaining the possession) cannot hurt the cedent (or assigner’s) creditors; for such rights are presumed, in all questions with creditors, to be collusive, and granted in trust for the cedent himself.’

As summonses to remove on the act of federunt 1756, are frequently used at present in place of precepts of warning, I have here inserted the said act of federunt, from which may be found out the law, as it presently stands, with respect to removings.

Edinburgh,

Edinburgh, December 14. 1756.

Act of Sederunt anent Removings.

‘ WHEREAS the difficulties that have
‘ occurred in actions of removing from
‘ lands, have been found to be highly
‘ prejudicial to agriculture, and both to
‘ masters and tenants, in respect that, du-
‘ ring the dependance of such actions,
‘ the lands are neglected and deteriorated
‘ by the defender, and the heritor’s secu-
‘ rity for his rent brought into danger,
‘ and tenants are discouraged from enter-
‘ ing into tacks by the uncertainty of their
‘ attaining to possession, and by their find-
‘ ing the subject of their tack much dete-
‘ riorated, during the dependence of the
‘ process of removing against the prece-
‘ ding tenant ;

‘ The Lords of Council and Session,
‘ resolving to remedy this great evil, do
‘ make the following regulations.

‘ 1^{mo}, That, where a tenant is bound
‘ by his tack to remove without warning
‘ at the issue or determination of the tack,
‘ it shall be lawful to the heritor, or o-
‘ ther setter of the tack, upon such obli-
‘ gation, to obtain letters of horning, and
‘ thereupon to charge the tenant with
‘ horning, 40 days preceding the term of
‘ Whitsunday, in the year in which his
‘ tack is to determine, or 40 days prece-
‘ ding any other term of Whitsunday
‘ thereafter ; and upon production of
‘ such tack and horning, duly executed,
‘ to the deputy sheriff or steward, or their
‘ substitutes, of the shire or stewarty where
‘ the lands lie, they are hereby authorised
‘ and required, within six days after the
‘ term of removal appointed by the tack,

‘ to

‘to eject such tenant, and to deliver the
‘possession void to the setter, or others
‘having right from him.

‘2do, Where the tenant hath not obli-
‘ged himself to remove without warning,
‘in such case it shall be lawful to the
‘heritor, or other setter of the tack, in
‘his option, either to use the order pre-
‘scribed by the act of parliament 1555,
‘entitled, *An act anent the warning of*
‘*tenants*, and thereupon pursue a remo-
‘ving and ejection, or to bring his action
‘of removing against the tenant before
‘the judge ordinary; and such action
‘being called before the judge ordinary,
‘at least 40 days before the term of
‘Whitsunday, shall be held as equal to a
‘warning, execute in terms of the fore-
‘said act; and the judge shall thereupon
‘proceed to determine in the removing,
‘in the terms of that act, in the same
E. 3 ‘manner

‘manner as if a warning had been exe-
 ‘cute in terms of the foresaid act of par-
 ‘liament.

‘ 3^{tio}, Where a tack is assigned, and
 ‘the assignation not intimated by instru-
 ‘ment, or where the lands are sublet in
 ‘whole or in part to subtenants, such
 ‘horning, execute as aforesaid, or where
 ‘process of removing and decret is ob-
 ‘tained, or where warning in terms of
 ‘the act 1555 is used against the princi-
 ‘pal or original tacksmen, the same shall
 ‘be effectual against the assignees or sub-
 ‘tenants, one or more; and the action of
 ‘removing against the principal or origi-
 ‘nal tacksmen, and the decret of remo-
 ‘ving following thereon, shall be sufficient
 ‘ground of ejecting them, any thing in
 ‘the former practice to the contrary not-
 ‘withstanding.

* 4^{to}, Where a tenant has irritated his
tack, by suffering two years rent to be
in arrear, it shall be lawful to the setter
or heritor to declare the irritancy be-
fore the judge-ordinary, and to insist in
a summary removing before him; and it
shall be lawful to the sheriff or Stewart-
deputy, or their substitutes, to find the
irritancy incurred, and to decern in the
removing, any practice to the contrair
notwithstanding.

* 5^{to}, Where a tenant shall run in ar-
rear of one full year's rent, or shall de-
sert his possession, and leave it unlabour-
ed, at the usual time of labouring, in
these, or either of these cases, it shall be
lawful to the heritor, or other setter of
the lands, to bring his action against the
tenant before the judge-ordinary, who is
hereby impowered and required to de-
cern and ordain the tenant to find cau-
tion,

'tion for the arrears, and for payment of
 'the rent of the five crops following, or
 'during the currency of the tack, if the
 'tack is of shorter endurance than four
 'years, within a certain time to be limit-
 'ed by the judge; and, failing thereof, to
 'decern the tenant summarily to remove,
 'and eject him in the same manner as if
 'the tack was determined, and the tenant
 'legally warned, in terms of the foresaid
 'act 1555.

' 6to, The Lords hereby enact and de-
 'clare, that no bill of advocation, or su-
 'spension of a decree, or process of re-
 'moving, be passed otherwise than by
 'three Lords in time of vacance, and by
 'the whole Lords in presence in time of
 'session; provided always, that, in vaca-
 'tion time, and when three Lords cannot
 'easily be found, it shall be lawful to the
 'Lord Ordinary on the bills, upon such
 ' bill

‘ bill of suspension, to grant lists from
‘ time to time, as he shall judge proper,
‘ to the end the complainer may have ac-
‘ cess to present his bill of suspension to
‘ three Lords, or to the court; and they
‘ hereby ordain, that, upon passing such
‘ advocacy or suspension, or at least
‘ within ten days after the date of the de-
‘ liverance thereon, the complainer shall
‘ be obliged to find sufficient caution, not
‘ only for what shall be decerned on the
‘ advocacy or suspension, upon discus-
‘ sing thereof, but also for damage and
‘ expence, in case the same shall be found
‘ due; and upon the complainer’s failing
‘ to find caution as aforesaid, such bill of
‘ advocacy or suspension shall be held
‘ to be refused, and it shall be lawful for
‘ the other party to proceed in his action
‘ of removing, or in the execution of his
‘ decret, as if no such bill of advocacy

‘ or

‘ or suspension had been presented or passed.
‘ fed.

‘ 7^{mo}, The said Lords do enact and declare, That, in all removings, whether
‘ originally brought before this court, or
‘ by advocacy or suspension, they will
‘ proceed and determine the same summarily, without abiding the course of
‘ any roll; and ordain this act of sederunt
‘ to be recorded in the books of sederunt,
‘ and published in the usual form.’

*Act of Parliament 1555, anent the
Warning of Tenants before mentioned.*

‘ Item, It is statute and ordained, that
‘ in all times cumming, the warning of all
‘ tennentes and uthers, to sit and remove
‘ fra lands, milnes, fishinges, and possess-
‘ siones

‘ siones quhatsumever, fall be used in
‘ manner following : That is to say, lauch-
‘ ful warning being maid ony time within
‘ the zeir, fourtie dayes before the feast
‘ of Whitsunday, outhor personally, or at
‘ their dwelling places, and at the ground
‘ of the landes, and ane copie delivered
‘ to the wife or servandes, and sailzieing
‘ thereof, to be affixed upon the zettes or
‘ dures of the dwelling places of the saidis
‘ landes, gif onie be ; and thereafter the
‘ samin precept of warning to bee red in
‘ the paroch kirk, quhair the landes lyeis,
‘ upon ane Sabboth daye before noone,
‘ the time of preaching or prayers : And
‘ ane copie left and affixed upon the maist
‘ patent dure of the kirk, fourtie dayes
‘ before the terme, and na furdur laying
‘ soorth of strestes, and remooveing upon
‘ *Wednesday*, to be used in time to cum.
‘ And gif the partie warned, in maner
‘ foresaid,

‘ foreſaid, removis not at the term, in that
‘ caſe, the warner ſhall incontinent, or ſa
‘ ſoone as pleaſes him, cum to the Lordes
‘ of Councel, or to the ſchireſſe of the
‘ ſchire, or uthers judges ordinaires, ha-
‘ vand juridiſtion, ſchawand his precept
‘ of warning ordourlie execute and indor-
‘ ſate, and ſhall have letters or precept to
‘ charge the parties warned, and poſſeſ-
‘ ſours of that ground, to compear be-
‘ fore the ſaidis Lordes, ſchireſſes or their
‘ deputes, or uthers, judges ordinaires
‘ foreſaidis, havand juridiſtion, upon ſex
‘ days warning, or langer, at the will and
‘ deſire of the perſewer, to hear and ſee
‘ them decerned to remoove, deſiſt, and
‘ ceaſe, conforme to the precept of warn-
‘ ing and execution thereof, or elſe to
‘ ſchaw ane reaſonable cauſe quhy they
‘ ſuld not do the ſamin, with certification
‘ to them and they ſhallzie, that letters ſhall
‘ be

‘ be direct *simpliciter* upon them in the
‘ said matter : At the quhilk day, gif they
‘ compeir not, the Lordes, schireffes, or
‘ uther judges ordinar havand jurisdiction,
‘ fall decerne them to remove, desist, and
‘ cease fra the landes ; and gif they com-
‘ peir and instantlie schawis sufficient title
‘ to bruik the landes, in that case, the sa-
‘ men judge to proceed and do justice, as
‘ accords of the lawe : And gif the par-
‘ tie compeiris and schawis nathing, but
‘ makis allegiance, and offers him to im-
‘ prove the indorsation ; in that case he
‘ fall not be heard in judgment ; bot gif
‘ he finde sufficient caution to the warner
‘ then instantly, that gif his alledgeance
‘ being foundin relevant be not sufficient-
‘ ly verified and prooven be him, that the
‘ profitis, damage, and interest, quhilkis
‘ the said warner, or ony others havand
‘ interest, hes susteined, or fall happen to
F ‘ susteine,

‘ susteine, be the delay of the foresaide
‘ alleageance, be refounded to him : And
‘ to the effect that this ordour may have
‘ sufficient processe in all times to cum,
‘ It is devised, statute, and ordaind, that
‘ all schireffes, and uthers judges ordinar,
‘ havand jurisdiction, as said is, be their-
‘ selves, or their sufficient deputes, bee
‘ reddie to sit be fenced courtes, all the
‘ lauchful fiftene dayes after immediatelie
‘ the feast of *Trinitie* Sunday, for doing
‘ of justice in the saidis causes, in manner
‘ aboon specified : And gif the schireffes
‘ or judges ordinares havand jurisdiction
‘ in maner foresaid, and their deputes,
‘ failzies to be reddie in granting of pre-
‘ cepts, and doing of justice for observing
‘ of this ordour ; in that case, they shall
‘ pay to the partie their hail damage,
‘ intereste, and expences, but prejudice of
‘ the

‘ the action against the violent occupypars
‘ and possessoures foresaidis.’

*Precept of Warning in terms of the
said Act 1555.*

A—— B—— Esquire of C. heritable
proprietor of the lands and others under-
written, To

executors hereof, conjunctly and
severally, specially constitute, greeting: *It*
is my will, and I desire and require you,
that, incontinent this my precept seen,
ye pass, forty days preceding the term of
Whitsunday next to come, old stile, and
lawfully warn, conform to the act of par-
liament made anent warning of tenants to
remove from lands, C. D. in E. tenant and
posseffor of the lands of E. and pertinents
thereof, lying in the parish of D. and shire

of E. to flit and remove himself, his wife, bairns, family, servants, sub-tenants, cottars, dependers, goods, and gear, forth and from his possession of the lands and others aforesaid; and to desist and cease therefrom, and leave the same void and redd, at the said term of Whitsunday next; to the effect that I, my tenants, or others in my name, may then enter thereto, and peaceably possess the same at my pleasure in time coming: And that ye use the hail remanent order of warning, for removing of him, and his foresaids, from the lands and others foresaid prescribed by law. Certifying him, if he do in the contrary, and continue to possess the lands and others foresaid, after the said term of Whitsunday next, old stile, he shall be holden and reputed as violent possessor thereof, and compelled to make payment of the violent profits of the same with all rigour.

According

According to justice, as ye will answer to me thereupon : The which to do, I commit to you, and each of you, conjunctly and severally, my officers in that part foresaid, my full power by this my precept. In witness whereof, I have subscribed these presents, (written by G. H. writer in I.) at —, the — day of — one thousand seven hundred and eighty — years, before these witnesses, J. K. and L. M. both my servants.

J. K. witness.

A. B.

L. M. witness.

This is commonly written on the face of a sheet, and does not require stamped paper.

Short Copy for the Tenant.

I ———, officer in that part,
 specially constitute by the precept of
 warning after mentioned, directed to me
 by A. B. Esq; of C. heritable proprietor
 of the lands of E. conform to the said
 principal precept, signed by him, of date
 the ——— day of ——— 178— years,
 Do hereby, and by virtue thereof, warn
 you C. D. in E. to flit and remove your-
 self, wife, bairns, family, servants, sub-te-
 nants, cottars, dependers, goods and gear,
 forth and from your possession of the lands
 of E. and pertinents, lying in the parish
 of D. and shire of E. and to leave the same
 void and redd at the term of Whitsunday
 next to come, old stile; to the effect that
 the said A. B. his tenants, servants, or
 others

others in his name, may then enter there-
to, and peaceably possess the same: With
certification, &c. This I do, upon the —
day of — 178— years, before these
witnesses — and —.

Three copies must be made out, one
for the tenant, another for the ground of
the lands, and the third for the kirk-door.

*Execution written on the back of the
Precept.*

Upon the — day of — one thou-
sand, &c. years, I — officer in that
part, specially constitute by virtue of the
within precept of warning, directed to me
by the within designed A. B. passed to
the dwelling-house of the within designed
C. D,

C. D. present tenant and possessor of the lands of E. and pertinents; and also to the ground of the said lands, and lawfully warned, conform to the act of parliament made anent warning of tenants to remove from lands, in all points, the said C. D. to flit and remove himself, his wife, bairns, family, servants, sub-tenants, cottars, dependers, goods, and gear, forth and from his possession of the said lands and pertinents, and to leave the same void and redd at the term of Whitsunday next to come, old stile, to the effect that the said A. B. and his tenants, or others in his name, may then enter thereto, and peaceably possess the same: And sikklike, upon the — day of —, and year foresaid, being Sunday, I passed to the parish-kirk of —, within which parish the said lands lie, and at the most patent door thereof,

thereof, at the dismissing of the congregation from the forenoon service, after crying of three several oyeses, I read and made public intimation of the within precept of warning, in audience of the parishioners convened thereat for the time, and made certification as is within expressed. This I did, conform to the said principal precept in all points, whereof I delivered a just copy, signed by me, to the said C. D. personally apprehended, and I affixed and left the like copy upon the ground of the said lands, upon the said — day of —; and I also affixed and left another copy upon the most patent door of the said kirk, upon the said — day of —; all which copies did bear and contain the respective dates hereof, and the witnesses names and designations present at the hail premisses, and

and hereto subscribing, viz. at the dwelling-house, and upon the ground of the said lands, J. K. and L. M. both servants to the said A. B. ; and at the kirk-door, P. Q. and R. S. both indwellers at —,

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T I T. III.

Submissions, Decrees-Arbitral, &c.

‘**L**AW is the command of a Sovereign, given as a common rule of conduct for his subjects;’ and is admirably adapted to the nature of society: For, when the turbulent and refractory members of it disobey this rule, by incroaching on, or with-holding the rights of any of the persons constituting that society, on application by the party injured, the compulsory power inherent in the Sovereign enforces obedience of the rule, or performance of the right. Kings, (or the supreme power, according to the nature

nature of the government) in the infancy of government, and laws, were themselves the judges, as well as lawgivers: But controversies, and applications for judgment therein, in course of time, having greatly multiplied, they found it necessary to appoint persons under them as judges, some supreme, and others subordinate; with a power of appeal from the inferior to the superior judges, in case of iniquity or error in their judgments. To preserve order and regularity in instituting law-suits, actions, or causes, (terms promiscuously used for the proceedings before these judges), and in conducting them when begun, forms of court have been established. Several causes requiring much investigation to discover the facts requisite to be known, it became necessary to postpone the determination of them from time to time, till they should
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be ripe for decision. Attendance at the different diets of court being inconvenient, and some persons better qualified for conducting causes than others, particular persons practised the management of these causes to other people for hire. In proportion to the number of these practitioners, in any place, forms of court have multiplied. The multitude of public acts, or promulgations of the law, by the legislative power; the number of forms and precedents in the respective courts, and the infinite variety in the cases brought before the judges, in which every nice distinction or quibble the art of man could invent, has been used to evade the operations of law and justice; these, in conjunction with the natural tendency of every thing in the world to corruption, have reduced the science of the law, and the method of obtaining justice, to an almost

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inexplicable mystery. *The judges, wearied in a struggle with the practitioners before them, or afraid of introducing innovations, have been unable always to prevent abuses creeping in, and to preserve the method of obtaining justice easy, unexpensive, and expeditious. Thus, it was sometimes better to sustain a loss or injustice, than be put to the trouble and expence of obtaining redress, by the tedious forms of law, against a litigious opponent, disposed to take every advantage, to start every difficulty, and to dispute every demand. This, however much to be regretted, could not be avoided, where either of the parties refused to comply with any reasonable terms of accommodation. But disputable cases often occurring between persons who were equally willing to have their matters in dispute settled, by a just decision, without going

to law, men at length, to accomplish this desirable purpose, fell upon the method of reference to persons on whose skill and integrity they could depend for determining their differences, in a simple and expeditious manner. It may possibly be thought by some nice speculatists, that arbitration, in point of antiquity, took place even of government and laws, or gave rise to them :—That it could subsist prior to law is hardly probable, because it would have wanted a power of enforcing implement of its decisions; and conquest, it is imagined, oftener than compact, was the foundation of government, of which laws are the consequent. To render the method of obtaining justice by arbitration complete and effectual, the legislature and judges have given it a power of enforcing its sentences by the sanction of their authority; and, as the arbiters are judges

constituted by the choice of the parties, have declared that no appeal, or reduction of their sentences shall be competent, even on grounds relevant for setting aside the determinations of the inferior judges of the law, or on any grounds, except bribery or falsehood. Thus, even allowing that arbitration had in a few instances given rise to the legislative power of government, by the people creating any person or persons universal arbiters of their rights; the legislative power of government has also, by the sanction of its authority, brought arbitration of private controversies and disputes to its present state of perfection.

A *submission* is a contract entered into between two or more parties, who have disputable rights or claims against one another, by which they submit and refer their differences, or disputes, to an arbiter

or

or arbiters, and oblige themselves to acquiesce in their decision under a penalty. In submissions where more arbiters are named than one, an oversman is also sometimes named, in case of their disagreement in opinion, who shall have power to decide finally: Sometimes the choosing of the oversman is left to the arbiters. The decret-arbitral must, in this case, bear that the arbiters differed in opinion, otherwise it will be null. When the day within which the arbiters are to pronounce their sentence is left blank in the submission, the time for deciding is limited to a year; when they make no mention of any particular time, or no place is left for filling up one, it is thought to subsist for 40 years; but, by the common practice, a power is given to the arbiters to prorogate the submission to such time as is convenient for the decision.

sion. Submissions expire by the death of either of the parties submitters, or of the arbiters, unless, as is sometimes the case, the submitters put in a declaration, that the reference shall not expire by the death of either party.

Arbiters cannot compel witnesses or havers of writs to compear before them; but, upon application from the arbiters, or any of the parties, the court of session will grant their *letters in supplement*, upon which they may be summoned. It will be necessary to send the submission to the person who applies for the supplement; and the summonses upon the letters in supplement must be executed by a messenger.

Where the points in dispute are various, the submission is written in the most general terms. When only a particular thing is to be submitted, the submission

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is made particular to that very point submitted. And as they receive the most ample interpretation, and when conceived in general terms, are extended not only to moveable, but heritable bonds, when it can conveniently be done, it is better to be particular as to the things to be submitted.

As the powers of arbiters are wholly derived from the consent of parties, where their power of determination is limited to a certain day, they must pronounce their decree-arbitral within the time limited by the submission, or on the day on which it expires ; they cannot subject the parties in a higher penalty than that in the submission ; nor in a special submission, pronounce sentence on subjects not contained in the submission ; for, in this case, their sentence is reducible, so far as they have acted *ultra vires*, (beyond their powers ;) they must

must determine all the points referred; and if partial as well as total decrees are intended to be valid, this may be expressed in the submission: They must be particularly careful not to determine only the claims of one party, and leave those of the other undetermined; as such determination is justly found null, as being inconsistent with the intention of submissions.

To conclude: "By the articles of regulation 1695, section 25. it is declared, that no decret arbitral, proceeding on a written submission, shall, for the future, be reducible on any ground but those of corruption, bribery, or falsehood;" and this supposes they are not acting *ultra vires*.

A General Submission.

THE *parties* following, viz. A. B. in C. *on the one part*, and D. E. in F. *on the other part*, having certain differences and disputes which they cannot settle themselves, have resolved to submit, and hereby submit and refer all such differences, disputes, claims, and demands, as are presently subsisting between them, upon any account or transaction whatever, to the amicable decision, final sentence, and decret-arbitral to be given forth and pronounced by J—— W—— in A—— and R. L—— in D. arbiters mutually chosen by the said parties, or, in case they differ in opinion, to J—— M—— in H——, oversman hereby appointed in that event, with power to the said arbiters or oversman to receive the claims of parties, with their respective objections

objections and answers thereto, and such other writings as the said arbiters or overman shall judge necessary to be laid before them, and to take all manner of probation they shall think proper, by writ, witnesses, or oath of party; and whatever the said arbiters shall determine, in whole or in part, in the premisses, betwixt and the day of next to come, or on or before any other day to which they shall prorogate this submission, which they are hereby empowered to do from time to time, as they shall see cause, *both parties* bind and oblige themselves, their heirs, executors, and successors, to acquiesce in, implement, and fulfil to each other, under the penalty of fifty pounds Sterling, to be paid by the party failing to the party observing, or willing to observe the same, over and above performance; *and they consent* to the registration hereof, prorogations.

gations, (if any be) minutes, and decreet-arbitral to follow hereon, in the books of Council and Session, or others competent, that letters of horning, on six days charge, and all other execution necessary, in form as effeirs, may pass hereon; and thereto they constitute

their procurators, &c.

In witness whereof, they have subscribed these presents, written upon this and the — preceding pages of stamped paper, by H—— L—— schoolmaster in M. at M——, the — day of —, one thousand seven hundred and eighty-two years, before these witnesses, N. O. farmer in P. and Q. R. indweller in S.

A general submission, though it extends to heritable bonds, does not to heritable subjects, whereof either party is in possession without any challenge or interruption

tion made by the other party prior to the submission, nor indeed to matters that would not fall under a general discharge, since one cannot be presumed to put it into the arbiter's power to set aside such claims when he does not specify them.

A *special submission* of a particular matter in controversy, may be written in the following or like form.

Submission betwixt the Relations of a Person deceased about his settlement.

THE *parties* following, viz. S. B. late in T. *on the one part*, and J. B. sister to the said S. B. and spouse to J. K. in S. with the special advice and consent of the said J. K. her husband, for his interest, and he the said J. K. as taking burden upon

be necessary to put in the following clause:

“ And in case of variance in opinion, to
 “ an oversman they shall appoint, whom
 “ they are hereby empowered to choose.”

*See tripartite submission among relations,
 and observations.*

A clause, declaring the submission shall not expire by the death of either of the parties, is sometimes put into submissions, immediately before the words, “ *consent-*
 “ *ing to the registration,*” and may be in this form: “ And it is hereby declared,
 “ that, although either of the parties shall
 “ die during the currency of this submis-
 “ sion, or prorogations thereof, the same
 “ shall nevertheless continue in full force,
 “ and be, with the decreet-arbitral to fol-
 “ low hereon, binding upon the heirs and
 “ representatives of the party deceasing,
 “ and the arbiters or oversman are here-

“ by

“ by empowered to [proceed in, and de-
 “ termine the matters submitted, as if no
 “ such death had happened, any law or
 “ practice to the contrary notwithstanding.”

*Submission of a depending Process of
 Spuilzie.*

THE *parties* after mentioned, viz. A.
 D. of M. *on the one part*, and J. M'C. of
 B. *of the other part*, considering that, *where-*
as there is at present depending before
 the Lords of Council and Session, a process
 of spuilzie at the instance of the said A.
 D. against the said J. M'C. ; and as the
 said parties are willing the same should
 be determined in an amicable manner,
they therefore have submitted, and hereby
submit and refer the same, and all que-

stions or debates that may arise thereupon, to the final sentence and decision to be given and pronounced by Mr A. M'D. and Mr W. G. Advocates, arbiters mutually chosen by the said parties submitters, with full power to the said arbiters to call for the said process, and all other writs concerning the same, and take all necessary probation thereanent, by witnesses or otherwise, which the said parties hereby oblige themselves to hold as good and valid as if taken before the Lords of Council and Session, in the event the submission shall not take effect by a decreet-arbitral; *and whatever* the said arbiters, or any oversman to be by them chosen in case of variance, shall give forth and determine in the premisses, betwixt and the

day of
next, or

any other day thereafter to which they shall prorogate this submission, the said

parties

parties submitters hereby bind and oblige themselves, their heirs, executors, and successors, to stand to, acquiesce in, and fulfil to each other, under the penalty of twenty pounds Sterling, to be paid by the party failzier to the party observer, or willing to observe, attour performance; *consenting* to the registration hereof, prerogations (if any be) minutes, and decret-arbitral to follow hereon, in the books of council and session, or others competent, that letters of horning, on six days charge, and all other execution necessary, in form as effects, may pass hereon; and thereto they constitute

procurators, &c.

In witness, &c.

The clause declaring the proof taken by the arbiters to be valid, though the matter should not be terminated by the

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arbiters,

arbiters, seems almost unnecessary ; for, without it, a reference by one of the parties to the oath of the other, while the matter is before arbiters, will be sustained as proof in a subsequent process, as also proof by witnesses on such points as a court of law would have allowed probation of by witnesses ; only, if there are objections against the witnesses, such court will consider them, and give them their proper weight ; and where a court of law would not allow such a mode of probation, notwithstanding of this clause, they would pay no attention to it.

Mr Erskine, in his large Institute, page 697. at the foot, mentions an easy method of executing submissions of debts or money claims, by the debtor's granting a bond to the creditor, and the creditor granting a discharge to the debtor, both blank in the sums, which are delivered to

the

the arbiter, to be filled up by him as he shall find just; and that, though it has been affirmed that such deeds are null since the statute 1696, prohibiting blank writings, *Spottiswood's note on Mackenzie's Institutes*, § *ult. h. t.* yet that statute prohibits such deeds only as are taken blank in the name of the creditor, or person in whose behalf they are granted, but does not strike against writings where the name of the person to whom they are granted is inserted, though they should be left blank as to the sum. If then, a bond granted by one party, and a discharge by the other, will answer the end, why not a bill as well as a bond? and, as bills are not generally holograph, the arbiter may write the bill, leaving it blank in the sum, and get it signed by the debtor, and afterwards fill it up, so as it may be all of one hand-writing.

Tripartite

*Tripartite Submission by the Children
of a Person deceased.*

THE parties following, viz. A. M'M. on the first part, G. M'M. on the second part, and I. M'M. on the third part, all children of the deceased W. M'M. in N. and E. H. also now deceased, his spouse, have each of them, for themselves, severally submitted and referred, and do hereby submit and refer to R. S. in T. arbiter unanimously chosen by the said three parties, what share or proportion of the effects which belonged to their deceased father or mother, or either of them, they, and each of them, have a right to claim or demand, and all questions, disputes, and differences thereanent, (a) with full power, &c. (in common form, as in the preceding examples).

As,

As, where there are both heritage and moveables left, if the heir think it for his advantage, he may add the heritage to the moveables, and draw an equal share of the whole, which is called collating : So where, in the examples of submission among relations of a person deceased, there is heritage, there is sometimes a clause put in collating the heritage with the executry, in order to put it more clearly in the arbiter's power to determine upon the whole subjects left ; though it is imagined he would have it sufficiently in his power without such clause. The clause I mean is this: ‘ And as I the said A. M'M. am satisfied that the heritable subjects of the deceased W. M'M. my father, falling to me as heir, be thrown in and collated with my said father's moveables and executry, so as to make one fund or division of the whole, therefore I, by these

‘ these presents, *collate* the said heritage
 ‘ with the said moveables and executry
 ‘ accordingly, so as that I may draw a
 ‘ share of the whole, according to the in-
 ‘ terest I shall be found to have therein.
 ‘ *Declaring*, that, in case the said heritage
 ‘ shall be found to be of greater value
 ‘ than each of the shares of the said exe-
 ‘ cutry, I the said A. M‘M. shall not be
 ‘ deprived of my additional claim by col-
 ‘ lating in manner above written.’

This comes immediately before ‘ with
 ‘ full power,’ &c. at letter (a).

Besides a *general* submission and a *spe-*
cial one, there may be a submission both
general and *special*; which goes on as
 far as the words ‘ upon any account
 ‘ or transaction whatever,’ in the exam-
 ple of a general submission; and then
 adds, ‘ and particularly without preju-
 ‘ dice of the generality foresaid;’ and
 thereafter

thereafter inserts the clauses used in a special submission. Writers have, in practice, frequently used this as the form for a special submission. A case of this kind, from the town of Muffelburgh, came before the Court of Session in the year 1783, upon different grounds, and, among others, that the decret was *ultra vires*; upon which it was very properly observed by one of the Judges, that this was a general submission as well as a special one, and, therefore, that the objection of being *ultra vires* did not so clearly appear. Another of the Judges, however, urged the practice of writing special submissions in this manner, and that the Court might take into consideration how far the general part was taxed by the special one which followed. There was no determination of this particular point, as there were several other singular circumstances attending

attending the case ; from this, however, it will appear how necessary it is to be express and pointed in the wording of writings executed for the purpose of an amicable determination of differences. Cases may indeed occur in which a general submission is proper, where there is also a particular matter which the parties are anxious to have determined, for which this form may be necessary ; but to use it for a special submission, with a view to make the arbiters powers more ample, or from any other motive, or from no motive, except the force of imitation, is certainly not commendable.

Prorogation

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*Prorogation of a Submission, on the
back of it, by the Arbiters.*

WE the within designed J. W. and R. L. *do hereby*, in virtue of the powers committed to us by the within submission, *prorogate* the same to the tenth day of August next. *In witness* whereof we have signed these presents, written upon the back of the said submission by the within designed H. L. at M. the first day of March one thousand seven hundred and eighty-two years, before these witnesses, G. K. and J. K. both merchants in L——.

This supposes the submission written upon the face of the sheet, or sheets pasted together, as was the custom for most of the writings about a century ago; but, if

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the submission should be written page-ways, it will be, 'We the before designed, &c. committed to us the before written submission, &c. written upon the third page of the foresaid sheet of stamped paper, by,' &c.

Within is properly enough used when a thing of this kind is written on the *second* page, and is sometimes used when on the *fourth*.

When it is not convenient to get the arbiters to prorogate the submission, it is sometimes done by the parties submitters as follows.

Prorogation

Prorogation by the Parties Submitting.

WE the within designed A. B. and D. E. parties submitters, having found that it will be inconvenient for the arbiters within named to meet betwixt and, or on the day within mentioned, to judge upon the matters within submitted, or to prorogate the within submission, *do therefore* hereby *prorogate* the same ourselves to the first day of December next to come, and *of new* again *submit* the whole disputable matters within mentioned to the said arbiters, and oblige ourselves to acquiesce in the decree-arbitral to be pronounced by them betwixt and the said first day of December, under the penalty within mentioned. *In witness, &c.*

Reference to Oversman.

WE J. W. and R. L. arbiters in the within submission, having differed in opinion with relation to the matters submitted, *do hereby*, in terms of the said submission, *refer* the said whole matters to the sole determination of J. R. of S. oversman within named. *In witness, &c.*

Decreet-arbitral by the Arbiters.

WE the within designed J. W. and R. L. arbiters mutually chosen by the within A. B. and D. E. conform to the within submission, *having considered* the mutual claims of parties, and having several times heard them thereupon, and being well and ripely advised therewith, and ha-
ving

ving God and a good conscience before our eyes, do both with one voice agreeing, pronounce and give forth our decret-arbitral in manner following, viz. (here take in the decerniture or sentence) and *we decern* and *ordain* both parties to implement and fulfil their parts of the premisses to one another, under the penalty of fifty pounds Sterling money, contained in the within submission, attour performance; and *lastly*, we *ordain* this our decret arbitral to be registrate in the books of Council and Session, or others competent, along with the within submission, conform to the clause of registration therein contained. *In witness* whereof, we the arbiters above named have subscribed these presents, written * upon the fourth page of the said sheet of stamped paper

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by

* Or upon the back of the submission, &c.

by H. L. within designed, at M. the — day of —, one thousand seven hundred and eighty-three years, before these witnesses, G. H. and J. K. both in L.

Decree-arbitral by an Oversman.

I Q. R. of S. oversman named in the within submission, and as having power from the within arbiters, by the before written reference, *having*, &c. and say *my* instead of *our*, and leave out ‘*both*’ ‘*with one voice agreeing.*’

If the submission bears to such oversman as the arbiters shall appoint, it will be,

I Q. R. of S. oversman appointed by the within designed J. W. and R. L. arbiters

biters mutually chosen by the also within designed A. B. and D. E. conform to the within submission, and as having power from the said arbiters by the before written reference, *having, &c.*

Before ending this title, I cannot help observing, that the opinions of counsel, if properly applied for and used, might be of considerable utility in the composing of differences by submission; particularly where the determination chiefly depended upon points of law. The Faculty of Advocates is a most respectable body of men, and the profession has always been held honourable; if any delay, or other misconduct, takes place in the management or conducting of causes before the supreme courts, it is nowise imputable to them, as the causes are conducted in these courts by agents or
attornies,

attornies, and the advocates only draw papers when these persons lay the processes before them, and furnish them with information as to the facts, or plead when they are called to it. Their fees are given as a gratuity or present, and not charged by them as debts, or considered as hire. As they are all persons of liberal education, who have regularly studied the law, their opinions justly merit the greatest attention; but, as presently applied for, there is little certainty of a decision of the Judges in terms of their opinion. One of the parties, on a memorial containing an unfair state of the case in dispute, applies to one lawyer, the other, upon a memorial containing a state entirely different, and equally partial, applies to another, and receive different opinions, which may nevertheless be perfectly right on the states of the case given:

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The case afterwards, upon proof, turning out differently from either of these states, produces a decision different from any of the opinions. But, if both parties were to concur in giving a state of the case, so far as they agreed, and of the facts alleged by each, but contradicted by the other; or, if such state were made out by the arbiter, or by some person appointed by him, from the claims of parties, and allegations of each, the opinion might be clear, so far as they agreed; and, even where they differed, would point out what pleas were relevant, what proof was necessary and proper, and on whom the burden of it should lie; which would tend much to facilitate the determination. *Or*, as there is no restriction as to the number or profession of the arbiters, advocates, or even the judges of the courts of law, are sometimes chosen
as

as arbiters ; nay, a case happened, which was referred to the King, who is the source from which all jurisdiction proceeds, in a question with respect to the grants of the benefices of the dignified clergy, and erection thereof into temporal lordships, by James VI. after the Reformation, submitted to King Charles I. who pronounced decret-arbitral thereon, 2d September 1629.

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T I T. IV.

Contracts of Sale..

A CONTRACT of sale is a voluntary agreement entered into between two persons or parties, whereby the one conveys right to, and becomes obliged to deliver something to the other, in consideration of a certain price in current money to be paid for it. The price may be fixed either by the parties, or by reference. Examples of both ways follow.

Contract

Contract of Sale of Victual.

It is contracted and agreed upon between A. B. of C. Esq; and E. F. merchant in G. of the one and other parts, in manner following: That is to say, the said A. B. hath sold, and hereby sells and dispones to the said E. F. his heirs, executors, and assignees, the number of one thousand bolls of victual, good and sufficient stuff, whereof five hundred bolls bear, and five hundred bolls oat-meal, the bear of the ordinary ——— measure, and the meal at eight stone weight per boll, of the said A. B. his lands and estate of C. and of the crop one thousand seven hundred and eighty ——— years; which quantity of victual, of the growth, quality, measure, and weight foresaid, he obliges himself, his heirs, executors, and successors, to deliver

liver to the said E. F. or his foresaids, or to any having his or their order, in writing, free on board any vessel or vessels, in the harbour of ———, to be sent therefor, betwixt and ——— next, and that under the penalty of ——— for each undelivered boll; *for which causes*, and *on the other part*, the said E. F. binds and obliges him, his heirs, executors, and successors, *not only* betwixt and ———, to send a vessel or vessels for receiving the said victual into the said harbour, there to remain eight work weatherly days to load the same, and to send a person sufficiently authorised to receive the victual, who shall be obliged to intimate the arrival of the vessel or vessels to the said A. B. personally, or at his dwelling-place, from the date of which intimation the lie days are understood to commence, *but also* to make payment to the said A. B. his heirs, ex-

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cutors,

cutors, or assignees, betwixt and ——— next, of ——— shillings and ——— pence Sterling for each boll of the said five hundred bolls of bear, and ——— shillings Sterling for each boll of the said oat-meal so delivered, with a fifth part more of penalty in case of failzie, and annualrent thereof from and after the said term of payment, during the not payment of the same; *and both parties* oblige themselves to perform their respective parts of the premises to each other, under the penalty of ——— pounds Sterling, to be paid by the party failing to the party observing, or willing to observe the same, over and above performance; *and consenting* to the registration hereof, &c. (registrating and testing clause as in minute of sale.)

If there is a cautioner for the purchaser, you go on as in the foregoing example,

ple, to "*for which causes, and on the other*
"part," and then say, "*the said E. F.*
"as principal, and L. M. in N. as his
"cautioner, bind and oblige themselves,
"conjunctly and severally, their heirs,
"executors," &c.

Contract of Sale, and Submission of
the Price, of a Tack, Crop, and
Instruments of Husbandry.

It is contracted and agreed betwixt the
parties following, viz. A. B. in C. on the
one part, and E. F. in G. on the other part :
That is to say, the said A. B. has sold, as-
signed, and disposed, and hereby sells, as-
signs, and disposes to, and in favours of the
said E. F. not only the tack of the farm of
C. as presently possessed by the said A.
B. belonging to H. J. in S. and that for

all the space of the current tack thereof yet to run, being — years from and after the term of Whitfunday next, which is hereby declared to be the said E. F.'s entry thereto, *but also* the growing crop of corn on the said lands, and whole horses, ploughs, carts, cart furniture, harrows, and instruments of husbandry (*a*), conform to an inventory thereof, of this date, subscribed by the said parties as relative hereto: *For which causes, and of the other part*, the said E. F. binds and obliges himself, his heirs, executors, and successors, to make payment to the said A. B. his heirs or assignees, of the value and price of the said tack, crop, horses, instruments of husbandry, and others above conveyed, as the same shall be valued by H. I. in J. and K. L. in M. arbiters mutually elected and chosen for that purpose, and in case of variance betwixt them, by
any

any overfman they fhall choofe to appoint, which they are hereby empowered to do, with power to the faid arbiters or overfman to infpect and view the premisses, and to fix the value thereof betwixt and the ——— day of ———, *declaring*, that the faid A. B. his heirs and fucceffors, fhall be obliged to free the faid E. F. of the rent and other burdens affecting the faid farm preceding the faid term of entry, he the faid E. F. being obliged to free the faid A. B. of the fame, in all time coming, after his entry; *and* it is hereby *agreed*, that the price to be fixed, in manner forefaid, fhall be payable againft the term of Martinmas next; and upon the faid E. F. granting security therefor, the faid A. B. *hereby obliges* himfelf and his forefaids, to make, grant, and fubfcribe a valid and formal fub-tack of the faid lands, upon ftamped paper, if neceffary,

and also a proper conveyance to the said moveables, and to warrant the same from fact and deed only. *And parties* being so agreed, they bind and oblige themselves to perform their respective parts of the premises to each other, under the penalty of twenty pounds Sterling, to be paid by the party failing to the party observing, or willing to observe the same, in case of failzie, over and above performance. *And consenting* to the registration hereof, and of the decret-arbitral to follow hereon, in the books of council and session, &c. (as in the preceding).

The inventory above mentioned is only a list or catalogue of the things sold, to the end of which you add this docquet:

“ This is the inventory referred to in a
 “ contract of sale and submission, of this
 “ date, entered into between A. B. in C.

“ and

“and E. F. in G. In witness whereof,
“they have signed the same at — the
“— day of — before these wit-
“nesses, P. Q. in R. and S. T. in W.
“writer hereof.”

If written by one of the parties, it may be, “signed the same, written by the said
“A. B. at,” &c. and leave out the words
“writer hereof.”

By an act 23d Geo. III. every piece of vellum or parchment, sheet or piece of paper, upon which shall be engrossed or written any inventory or catalogue of any furniture, goods, or effects, made with reference to any agreement, or for the security of any person (except inventories producible in the ecclesiastical courts, and also except inventories of goods and chattels distrained for rent in arrear) shall be charged with a stamp-duty of 2 s. 6 d. It would, therefore, be a saving to de-
scribe

scribe them in the contract at letter (a). Thus, instead of conform, &c. say, "fol. lowing, viz. ———horses, ———ploughs," &c. &c. and so on with the whole, and then go on, "*For which causes,*" &c.

Decreet-Arbitral thereon.

WE K. I. and K. L. before designed, have accepted of the reference to us by the before written contract of sale and submission; and having this day, in presence of the parties, inspected and viewed the whole articles submitted to our determination, and having God and a good conscience before our eyes, do unanimously pronounce our final sentence and decreet-arbitral as follows, viz. We hereby value and appretiate the whole foresaid articles together, at the sum of three hundred

hundred pounds Sterling, which sum we decern and ordain the before designed E. F. to pay to the also before designed A. B. against the said term of Martinmas next, in terms of the before written contract and submission, and that under the penalty of twenty pounds Sterling therein stipulated, over and above performance; and we ordain this our decret to be registrate along with the within contract and submission, conform to the clause of registration therein contained. In witness whereof, we have subscribed these presents, written upon the fourth page of the sheet of stamped paper foresaid, by the before designed — at C — the twenty-sixth day of August one thousand seven hundred and eighty-three years, before these witneses, W.-V. in T. and H. Y. in Z.

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In the first example above mentioned, where it is a quantity of grain that is sold, or the like, and that which is purchased is not distinguishable or set apart from the rest by both parties; and it is only the measuring or delivery that ascertains the purchaser's part of it from the other parts, the risk till delivery clearly lies upon the seller.

In the other case, if the contract was entered into before the term of entry, and decret-arbitral pronounced, and there happened any trifling deterioration, the purchaser would, it is doubted, be obliged to bear the loss; for he could only get the subject of the contract as it stood at the term, and the decret-arbitral would be obligatory for the price; but, if the loss were occasioned by the seller's fault, there would be an action against him for damages, if not an objection to the payment;

but

but as the arbiters are not tied to a particular day, the decret of valuation and the delivery are often on the same day. And, where stock is conveyed in this way, it is necessary to gather them together, in order to ascertain the value, and one gathering serves for both purposes; matters of the nature of this last mentioned are often submitted verbally, and settled on or about the term day by verbal submission, and bill granted, and delivery got, at the same time, before a concourse of the neighbours, without any other writing, as observed in the end of the title concerning *tacks*, and *conveyances thereof*.

TIT.

T I T. V.

I N D E N T U R E S.

— *betwixt a Joiner and his
Apprentice.*

IT is contracted, agreed, and by way of indenture ended, betwixt the parties following, viz. A. B. joiner in N. *on the one part*, and C. D. son of G. D. in E. in the parish of F. with advice and consent of the said G. D. his father, and the said G. D. as taking burden upon him for his said son, *on the other part*, in manner under-written: *That is to say*, the said

C.

C. D. with consent foresaid, hath become bound, and hereby binds himself an apprentice and servant to the said A. B. in his trade and employment of a joiner, and that for the space of — years from and after this date, hereby declared to be his entry to the said apprenticeship, during which space, the said C. D. apprentice foresaid, binds and obliges himself, faithfully and honestly, to serve his said master, by night and by day, holiday and weekday, and to obey all his master's commands in every thing lawful and ordinary for any apprentice in the like cases, and not to absent himself from his said master's service upon any pretence whatever, without liberty asked and obtained, otherwise to serve two days for each day he is so absent; and that he shall not reveal his master's secrets, nor do or know any thing that may tend to

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his

his prejudice, without timeously discovering the same, that it may be prevented; nor shall frequent taverns or ale-houses, or keep company with idle or disorderly persons, or play at cards, dice, or other pernicious games, whereby he may be withdrawn from his master's service, or his own instruction; and that he shall be careful of his master's tools and goods committed to his charge, and shall make payment to his master of all damages he may sustain or incur through his fault or neglect, any manner of way; and for the said C. D. his more sure performance of the premises, J. L. in M. binds and obliges himself, his heirs and successors, as cautioner for, and conjunctly and severally with the said C. D. *For which causes, and on the other part, and in consideration of the sum of five pounds Sterling of apprentice-*

prentice-fee instantly paid by the said G. D. for his said son to the said A. B. whereof he hereby grants the receipt, and discharges all concerned, the said A. B. *binds* and obliges himself to teach and instruct his said apprentice in his trade and employment of a joiner, in so far as he knows the same himself, or his said apprentice is capable to learn; and also, to maintain and provide the said C. D. in bed, board, and washing, during the foresaid space; and for the said A. B. his more sure performance of the premises, N. O. in P. binds and obliges him, his heirs and successors, as cautioners for, and conjunctly and severally, with him: *And both parties bind and oblige* themselves to perform, implement, and fulfil their respective parts of the premises to each other, under the penalty of five pounds Sterling, to be paid by the party failing to the party observing,

or willing to observe the same, by and at-
 tour performance; *and consenting* to the
 registration hereof in the books of Coun-
 cil and Session, or others competent, that
 letters of horning, on six days charge, and
 all other execution necessary, in form as
 effeirs, may pass hereon; *they constitute*
 their procurators, &c.

In witness whereof, these presents, written
 upon this and the two preceding pages of
 stamped paper, by W. D. schoolmaster at
 C. are subscribed by the said parties as
 follows, viz. by the saids ————
 and ————, at ————, the ————
 day of ————, one thousand seven hun-
 dred and ————, before these witnesses,
 H. I. and J. K. both indwellers in N.
 (and if there is one or two who sign in a
 different place) and by the saids ————
 ———— and ————, at ————, the ————

day

day of —, and year foresaid, before these witnesses, Q. R. and S. T. both in U.

Besides being written on stamped paper, paying the ordinary duty, (which, by act 23d Geo. III. imposing 1s. additional, is now 5s.) a duty of 6d. in the pound under L. 50, and 1s. in the pound for sums exceeding it, paid or agreed for with apprentices for five years, is given by statute, 8th Anne, cap. 9.; the indentures to be brought to the head office, or to some collector of the stamp-duties, and the duty paid. If to a collector, he shall indorse a receipt. Indentures so indorsed, if execute within 50 miles of London, must, within three months, but, if at a greater distance, within six months after date, be brought to the head office at London and stamped; and, if the full sum be not inserted, or the duty not paid, indentures

shall be void, and apprentices incapable of following trades. The duty to be paid by the master or mistress. Money given with apprentices, either by parish or public charities, pays no duty. This act is made perpetual by 9th Anne, c. 21. By 18th George II. c. 22. § 23. masters neglecting to pay, to forfeit double duty. Apprentices paying the double duty, within a year after forfeited, (the master not having then paid it, tho' required), may within three months thereafter demand of his master, or his executors, the sum paid to him in respect of his apprenticeship, and, on non-payment in three months after such demand, sue for the same. On the apprentice's paying, as aforesaid, he may be discharged from his apprenticeship, and from all penalties and damages, for not serving his time. By stat. 20th Geo. II. c. 45. § 5. if the ma-
ster

fter pay the double duty, and tender the indentures to be stamped within two years after the determination of the apprenticeship, and before any suit for recovery thereof, in such case the indenture shall be valid, and the apprentice capable of following his trade. Sect. 6. If the master become liable, as aforesaid, to double duty, and the apprentice shall at any time after such forfeiture incurred, either in the presence of, or by writing under his hand, signed in presence of one or more credible witnesses, require his master to pay the said double duties, and such master shall not within three months after such request pay the same, and such apprentice shall, at any time within two years after the determination of his apprenticeship, pay the said double duty so forfeited and not paid by his master, he may within three months after such payment demand

mand of his master, his executors, or administrators, double the sum, or other consideration paid, or contracted to be paid to such master in respect of such apprenticeship, &c. and on non-payment thereof within three months after such demand, may sue for and recover the same, with full costs of suit, by action of debt, &c.; and every such apprentice, immediately after payment of the double duties aforesaid, and upon signifying by writing that he desires to be discharged from his apprenticeship, shall be accordingly discharged therefrom, and from all actions and forfeitures for not serving the time he was bound to serve such master. And it is by this act, as well as the former, provided, that every such apprentice shall have the same benefit and advantage of the time he shall have continued with such master as he could or might have done

done in the case of any assignment or turning over to any new master. Apprentice paying within the two years after the end of his indenture said double duty, shall be entitled to exercise his trade, and the indentures be good in law.

The reason why apprenticeships for *five* years are made liable, seems to be, that *seven* years are necessary to enable one to exercise their trade in any part of England. Now, apprenticeships in Scotland are often only for three or four years: But it is understood in England, that following the trade seven years is sufficient without any binding, and that the serving as an apprentice is sufficient, though no actual apprenticeship existed; and that for trading in country villages, there, apprenticeships are not requisite.

By act 22d Geo. II. c. 44. §. 1. officers, marines, or soldiers, who had been in his Majesty's

Majesty's service, might exercise such trades as they were apt for, in any town or place within Great Britain and Ireland, without molestation.

I shall only further add under this title of indentures, the form of the contracts or indentures used in the time of emigration to America, betwixt the merchants and persons emigrating. They were sometimes written, and at other times printed upon paper, with a print of a ship on the top, and had blanks left for the names of the parties, the times of service, &c. They were executed in the English form, and called indentures, a word almost as extensive in its signification in England, as the word contract is in Scotland, and not confined to the agreement betwixt a master and his apprentice.

Indenture

Indenture betwixt a Company of Merchants trading to America, and a Person intending to emigrate thither.

THIS Indenture, made the twenty-fourth day of February, in the fourteenth year of the reign of our sovereign Lord, George the Third, and in the year of our Lord one thousand seven hundred and seventy-four, *between* Tristram Tickletoby — of Newtonstewart, in the county of Wig-toun, aged twenty years or thereabouts, of the one part, and Sk-r-n, C-pl-nd, B-l-ff, and Co. of Whitehaven, merchants, of the other part, *witneffeth*, that the said Tristram Tickletoby, of his own voluntary will and consent, and for the considerations

rations herein after mentioned, doth covenant and agree to and with the said Sk-r-n, C-pl-nd, B-l-ff, and Co. to serve them or their assigns in America, for the term of three years, to commence and be computed from the time of the ship's arrival at her port of discharge in America; during which term he the said Tristram Tickletooby will well and truly serve his said masters, or their assigns, as a good and faithful servant ought to do, and that he is not at this time under contract to any person whatsoever: *In consideration* of which servitude, they the said Sk-r-n, C-pl-nd, B-l-ff, and Co. do covenant and agree to and with the said Tristram Tickletooby, that they will, with all convenient speed, and at their own proper cost and charge, cause him the said Tristram Tickletooby not only to be carried and conveyed

veyed to Boston in America, but to find him all necessary wearing apparel, meat, drink, washing, and lodging, sitting and convenient, as is usual, for a good and faithful servant to have; and, at the expiration of the term, the said Tristram Tickletoy shall be entitled to such corn and land as is usual by the custom of the country. *It* is further agreed, that, in case the above named Tristram Tickletoy do pay, or cause to be paid to Sk-r-n, C-pl-nd, B-l-ff, and Co. or their assigns, the sum of four guineas in ten days after the ship's arrival in America, together with what money shall be advanced at his request, that then this indenture to be void and of no effect, otherwise to remain in full force and virtue. *In witness* whereof, they have hereunto, interchangeably,

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set

set their hands and seals the day and year
above written.

Sealed, signed, and } Tristram Tickletoby, L. S.
delivered, in the } Sk-r-n, C-pl nd, B-l-ff,
presence of us } & Co. L. S.

Ja. Martin.

Tobias Tickletoby.

These are to certify, that the above na-
med Tristram Tickletoby came before me
the Honourable A. B. Esq; Lord Provost
of Wigtoun, head borough of the county
of Wigtoun, the day and year above
written, and declared himself to be a
——, no covenanted or contracted ser-
vant to any person or persons, and goes
with the free consent of Tobias Tickletoby
by his father, the subscribing witness, and
that he is of the age of twenty years, not
enticed or kidnaped, but desirous to
serve.

serve agreeable to the tenor of the indenture above written. *In witness* whereof, I have hereunto affixed my seal.

Provost signs here.

*Provost's seal, or seal
of the burgh, affixed
here.*

The blank left after the name *Tristram Tickletoby*, in the beginning of the preceding indenture, and before the words *no covenanted*, in the Provost's certificate, are intended for the occupation or calling of the person covenanting, such as day-labourer, &c.

It may be here observed, that writings must be perfected, not according to the solemnities used in the country where the parties contractors reside, or they are signed, but according to those used in the

country where they are to receive execution: Which accounts for the foregoing contract entered into by parties, the one Scots, and the other English, being made out according to the English form, which is also the form used in America, and in the British plantations abroad.

Personal obligations are sometimes allowed as an exception, though possibly not entitled to such summary execution, as if made out according to the form of the place where they receive execution.

The appearance of the person indenting himself before the Provost, has possibly taken its rise from statute 4th George I. c. 11. § 5. whereby it is enacted, that,
 “ where any person of the age of 15
 “ years, and under 21, shall be willing to
 “ be transported, and enter into any ser-
 “ vice, in any of his Majesty’s plantations
 “ in America, it shall be lawful for any
 “ merchant,

“ merchant, or other, to contract with
“ him for such service, not exceeding
“ eight years ; providing such person
“ binding himself come before the Lord
“ Mayor of London, or some other justice
“ of the city, (if such contract be made
“ there), or before two justices of the
“ peace of the place where such contract
“ shall be made, and acknowledge his
“ consent, and sign such contract in their
“ presence, and with their approbation ;
“ and such merchant, or other, may trans-
“ port such person, and keep him in any
“ of the plantations, according to such
“ contract : Which contract, and appro-
“ bation of such magistrates, shall be cer-
“ tified by such magistrates to the next
“ quarter sessions, to be registrate by the
“ clerk to the peace without fee.”

By statute 5th Geo. I. cap. 27. and
23d Geo. II. cap. 13. the enticing of, or

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contracting

contracting with, artificers or manufacturers, is prohibited under very heavy penalties, and trying of the persons guilty thereof before the Court of Justiciary; as also the carrying abroad tools used in the manufactures. Artificers going abroad, and not returning when desired, are declared incapable of receiving legacies, &c.

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T I T. VI.

Testaments, General Dispositions, &c.

IT seems to be universally allowed that, in the first ages of the world, a right of property was acquired by the first occupant; by whose death, or in his lifetime, relinquishing the possession, the next occupant acquired right. If the property was relinquished for any consideration, and with a view to being occupied by a particular person in preference to others, this was done by tradition, and followed by possession; which being the first notice given of relinquishing the property, the person for whom it was intended being thus

thus first in the knowledge of it, became the next occupant. Or, in case of death, the nearest relations, if no previous tradition was made to them, by having the first intelligence thereof, came to be the next occupants. There was an additional reason also for preferring them, particularly the children of the persons deceased, or other near relations who had lived in family with him. These having laboured for their joint behoof in the concern, had formed a society in regard to the property, which was thus in part relinquished in their favour, and occupied by them, and the share of the deceased, by his decease, accrued to the survivors: Thus, children, and other near relations, came to be considered as having a right, which we term a right of succession. Where the person deceasing wished to favour or reward any of these persons in a particular

particular manner, he would make some expression of his will to that purpose. In case of no tradition previous to the death of a person, or expression of his will with regard to the property after his death, the method of division thereof, or course of succession by law, is regulated not by the law of Nature, but by the particular or municipal laws of different kingdoms, and various and different countries. The purpose of the present title is to shew how this matter, (in so far as relates to moveables), is regulated by the laws of Scotland, and in what form the will of the person deceasing is to be expressed, to make it effectual.

Before entering into succession in moveables, and the method of settling them among relations, by deeds to take effect after the death of the person making such settlement, it is necessary to know

know what are considered as moveables. Cash, plate, bullion, jewels, pictures, books, corns, cattle, instruments of tillage, household stuff, ships of the largest size, with their furniture, and, in general, whatever moves itself, or can be moved; whatever is not annexed to land, and produces no yearly fruits, arrears of interest on a moveable bond, or bond of annuity, debts due by accompt, as also by bills and promissory notes, although debts due by bill or promissory note carry interest, as it arises by law, and not from any clause in the security, are all moveable. Personal bonds bearing interest were formerly, on this account of bearing annual fruits, considered as heritable; but, by act of parliament, they are now heritable only as to the relict, and moveable as to the succession; that is, although the widow is entitled to a legal provision

provision out of the husband's moveable estate, upon the dissolution of the marriage by his death, in consequence of the communion of goods, she hath no claim to any part of these bonds bearing interest, due to him, either as to principal or interest, (except the arrears of interest of the said bonds at the husband's death, which, as before observed, are moveable), but they descend to the executor, or younger children, unless executors are excluded; and, if secluding executors, they descend to the heir, by force of the the destination in them.

In the succession of moveables, the next of kin to the deceased succeeds to the whole; and, if there are any more than one in the same degree, they succeed equally, without any preference of the eldest to the youngest, or males to females. Grandchildren are not, however, entitled to

to a share, as coming in place of their deceased parent, who is presumed to have received his part in his lifetime; except in cases between the full and half blood; in which case a niece by the full blood will be preferred before a brother by the half blood.—An heir to heritage has no share in moveables, if there are others equally near in degree of kindred to the deceased; but may insist on the others to collate or slump the heritage and executry into one mass, and draw an equal proportion of the whole, if he find it more for his interest than to hold by his exclusive claim to the heritage. If a person deceasing have neither wife nor child, he can test upon his whole moveable estate, excluding the person who might otherwise be his legal successor. If a person deceased leaves a widow, but no child, the goods in communion betwixt them

them divide in two, one half goes to the widow, the other is the dead's part, *i. e.* the absolute property of the deceased, on which he can test, and which falls to his next of kin, if he dies intestate. Where he leaves children, one or more, but no widow, the children get one half as their legitim; the other half is the dead's part, which falls also to the children, if the father has not tested upon it. If he leaves both widow and children, the goods are divided into three parts, the widow takes one third by herself, another falls as legitim to the children, equally among them, and even to an only child, and that although he should succeed to heritage; the remaining third is the dead's part. Where the wife predeceases without children, one half is retained by the husband, the other falls to her next of kin, or she may test on it. Where she leaves children,

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dren, two thirds remain with the surviving father, as if one third were properly due to him in his own right, and another as administrator for his children, the remaining third being the wife's share, goes to her children, whether of that or any former marriage; for they are all equally her next of kin, and she may settle the division of it among them by testament, without her husband. Minors also may test without their curators.

Before the effects can be divided, the debts and funeral charges must be deducted. Bonds bearing interest do not diminish the relict's share when due by the deceased, as when due to him they do not increase it; and the funeral charges of the wife predeceasing fall wholly on her executors having right to her share.

Testaments, in their strict acceptation, must contain a nomination of executors,

(i. e.)

(i. e.) of persons appointed to administer the succession, or execute the will of the deceased), though a settlement of moveables may be made without appointing executors; and, on the contrary, a testament appointing executors, though the person or persons having right to the succession be not named. In this case the executor is merely a trustee for the next of kin, but may retain a third of the dead's part for his trouble, in payment of which, any legacy left to him must be imputed, so far as it goes.

Testament to a Sole Executor and Universal Legatee.

I A. B. in C. being at present sound in memory and judgment, and considering the uncertainty of this life, *do hereby nominate and appoint* C. B. in A. to be my

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sole

sole executor and universal intromitter with the whole goods, gear, debts, sums of money, household-furniture, and other moveables whatsoever, that may pertain, belong, or be resting and owing to me at the time of my death, in virtue of bonds, bills, or any other manner of way (a). All which I hereby leave and bequeath to him, together with the vouchers and instructions of the said debts themselves, and all that has followed, or may follow thereon; with power to give up inventory, confirm testament, and do every other thing thereanent, that any other executor can, or may do by law; but with and under the burden of payment always of all my just and lawful debts that shall happen to be resting and owing by me at the time of my decease, and of my funeral charges (b). *And this I declare to be my last will and testament; reserving, nevertheless,*

less, full power to me, at any time in my lifetime, to alter, innovate, or annul the same at pleasure. *And I consent* to the registration hereof in the books of Council and Session, or others competent, therein to remain for preservation; and thereto constitute

my procurators, &c. *In witness* whereof, I have subscribed these presents, written upon this and the preceding page of stamped paper, by ———, at C. the ——— day of ———, one thousand seven hundred and eighty-two years, before these witnesses, E. F. of G. Esq; and G. H. my servant.

There are none of the acts of parliament relating to the stamp-duties upon paper, &c. whereby it is required that testaments be written upon stamped paper, though, in practice, they sometimes are

written upon it. If not written on stamped paper, leave out the words, "of stamped paper," in the subscription clause.

The executor, notwithstanding of a testament, is not completely vested in the right of the moveable estate of the deceased, or dead's part, before mentioned, without confirmation; which is a sentence of the commissary, empowering an executor, upon making up inventory of the moveables pertaining to the deceased, to recover and possess them: Inasmuch that, if the executor die before confirmation, the dead's part is considered as a part of the estate of the first deceased, and goes to his next of kin, and not to those of the executor so deceasing before confirmation; and it is a good defence against payment to the executor, that he has not confirmed, and used very often where the sum due is small, and the subjects left cannot

well

well afford the expence. The widow and children's legal shares operate *ipso jure* in their favours without confirmation, and consequently pass from them to their next of kin, though they should die before the testament is confirmed.

As, then, it is only the dead's part that needs confirmation, where the subject left is trifling, it is a hardship to be put to the trouble and expence of it, where it can possibly be avoided. Special assignations, though neither intimated nor made public during the life of the granter, carry to the assignee the full right of the subject assigned without confirmation; act parl. 1690, cap. 26 *. So, if it were convenient to mention the particulars left, you might, at letter (a) say, "all which I hereby assign, convey, and make over to, and in
"favour

* See end of this title.

"favour of the said C. B. his heirs, exe.
 "cutors, and assignees, to be used and
 "disposed upon at their pleasure, and par.
 "ticularly, without prejudice to the gene.
 "rality foresaid, the sum of — pounds,
 "contained in, &c. *Item*, the sum of —
 "pounds, contained in," &c.; and so on
 with every sum and article left.

Or the following clause, it is thought,
 would answer the purpose; go on as above,
 to "and particularly," and say, "with-
 "out prejudice to the generality foresaid,
 "whatever goods, gear, debts, sums of
 "money, household-furniture, or other
 "moveables, shall be contained in a list
 "or inventory thereof, that shall be sub-
 "scribed by me, at any time in my life,
 "as relative hereto; and which list or in-
 "ventory, when so subscribed, shall be
 "taken and deemed as a part hereof, and
 "exclude the necessity of confirmation."

And

And then, in either of these cases, go on with, “but with and under the burden of payment always,” &c.

In this case it would be adviseable to write the testament upon stamped paper, as, by containing the above assigning clause, it may be said to be an assignation, which requires stamped paper. The above mentioned inventory does not fall under the act 23d George III. *imposing a stamp duty of 2 s. 6 d. on inventories*, (taken notice of under the title of *Contracts of Sale*).

The next of kin, by the bare possession of moveables, acquires the property thereof, without confirmation, and transmits it to his executors; as was found by a decision 14th Nov. 1744. Confirmation also of a part by an executor, *qua* nearest in kin, carries the whole, as it proves his right to the office; and commissaries are
now

now obliged to take such inventories of the effects, &c. as are offered.

The particular case in which confirmation is most necessary is, where the person deceasing (either with or without making a testament) has left his matters in such a situation that there is a danger of his debts not being paid. Formerly the Bishops, in whose places the Commissaries now are, were entitled to the twentieth part of the moveables, without deduction of the debts, which was termed the *quot of the testament*. These quots were prohibited by 1661, c. 28. without prejudice of the ordinary fees of court. They were again restored by 1669, c. 19. with this restriction, that they should be paid out of the *free gear*, and with the exception of provisions to wives by contracts of marriage, in so far as the inventory might extend to five years purchase of the life-

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rent ; as also excepting any share of the moveables left to her : And with the exception likewise of the effects of poor people, where their effects, heritable and moveable, did not extend to L. 40 Scots, and which last were only to pay for fees of court two pounds eighteen shillings Scots. But the said act 1661, discharging quots without prejudice of the ordinary fees of court, is again revived by act 1701, c. 14.

If the testament be to a sole executor, burdened with legacies, you must, at letter (b), after the words “ funeral charges,” add, *as also*, with and under the burden of the legacies underwritten, which I hereby *leave* and *bequeath* to the persons after named, in manner after specified, viz. I *leave* and *bequeath* to I. K. in L. the sum of ——— pounds Sterling. Item, I *leave* and *bequeath* to M. N. in O.
my

my gold-headed cane, the watch I usually wear, my best sword, and pair of pistols; and I appoint my said executor to make payment of the said money legacy at the first term of Whitsunday or Martinmas after my decease, with annualrent of the said sum from and after the said term of payment, during the not payment thereof, and to deliver the said cane, watch, sword, and pistols, immediately after my decease, at whatever time the same shall happen. And this I declare, &c.

If, instead of the above money legacy, a debt is bequeathed, you must add, after mentioning the sum as in the money legacy, "contained in a bill dated the — day of ——— one thousand, &c. years, drawn by me upon, and accepted by S. T. payable ——— after date, with the whole interest due, or that may be due thereon;" and leave out what re-

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lates to the term of payment of the money legacy, "and to deliver the said bill, with "the said cane, watch," &c.

If it is the intention of the testator that the legatee shall draw the full of the legacy left him by the debt so bequeathed, whether that debt be recovered or not; and if there is any danger of insolvency, it is necessary to add the following alternative: "Or in case the said S. T. shall "fail to make payment thereof after diligence has been raised and execute against him on said bill, then I hereby "leave and bequeath to the said I. K. the "sum of ———, equivalent to the contents thereof." Though, in this case, it is much better to leave the equivalent sum first, and saves the legatee the trouble of doing exact diligence, to preserve his right to the equivalent sum.

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If

If a debt was legated, and this clause not adjected, and any deficiency happened, the legatee would be obliged to bear it; but, in the case of a general legacy, if there is not a sufficient fund for payment of all the legacies, each of the general ones must bear a part; but a special legatee is not obliged to bear any.

Though, as before mentioned, where a man has a wife and children, it is only a third part of his effects he can test on; yet, if he has sufficiently provided for them, in satisfaction of their legal shares of his effects, he can then test in a general manner, though, to make it clear that such provisions have been made, and that it is only the residue, after satisfying them, that is tested on, it may be proper to add after “with the burden, not only of my
“just and lawful debts that shall happen
“to be resting and owing by me at the

“time

“time of my decease, and of my funeral
“charges,” “but in particular, in pay-
“ment of the several provisions made by
“me to C. my spouse, in satisfaction of
“her *jus relictæ*, and also to D. and I.
“my children, in satisfaction to them of
“their legitim and bairns part of gear.”

For example, if the husband had granted
a bond of annuity to his wife for a sum
with which she was satisfied, in place of
her legal share, and bonds of provision to
the children, the above clause would be
very proper.

If all parties, husband, wife, and chil-
dren, were agreed that a general testa-
ment should be made, and they thereby
provided in particular sums, in place of
their legal shares, it would be necessary,
after leaving and bequeathing the sums to
them in common form, as above, to say,
“*declaring* the above provisions in favour

“ of C. E. my well-beloved spouse, to be
 “ in full of all she can ask or claim by my
 “ decease, in virtue of her *jus relictae*;
 “ and *declaring* the above provisions, in
 “ favour of my said children, to be in
 “ full contentation and satisfaction to
 “ them of all executry, legitim, portion-
 “ natural, bairns part of gear, or others
 “ whatsoever, they, or any of them, can
 “ ask, claim, or demand of me, by and
 “ through my decease, by contract of
 “ marriage betwixt my said spouse and
 “ me, former bond of provision, or any
 “ other manner of way whatever.”

Without these declarations it might be a doubt whether these provisions were besides their legal shares, or in satisfaction of them.

In case one should incline to let them draw their legal shares, and only to test on the dead's part, and to leave a part of it

it to some of them also, it would be proper, after the bequeathment to such person, to add, “and that over and above their legal share of my effects at my decease.”

Special legacies are considered as really assignations, and so fall under the statute 1690, before mentioned, and need not be confirmed. Where the dead's part is small, and only a few legacies to be left to affect it, the following form might answer the end, being a *settlement* without appointing executors.

Settlement affecting Dead's part.

I A. B. in C. for the affection and regard I have to the persons following, do hereby *leave* and *bequeath* to them the sums of money, goods, and effects, after specified, viz. I *leave* and *bequeath* to C.

D. in E. the sum of ——— pounds Sterling, contained in a bond granted by F. G. in H. to me, dated ———, payable ———, with the whole interest due, or that may fall due thereon. *Item*, to H. I. in J my gold snuff box. *Item*, to L. M. in O. Pope's Iliad, Milton's Paradise Lost, and Ossian's Poems; the said bond and other legacies to be delivered to the saids C. D. F. G. and H. I. immediately after my death. *And I consent* to the registration hereof in the books of Council and Session, or others competent, therein to remain for preservation; and thereto constitute

procurators, &c. In

witness whereof, &c.

Codicils

Are in general supplements to testaments. They are sometimes necessary, as
where

where a person has made his testament a considerable time prior to his death, and some time after he has made it, intends to leave a legacy or legacies; other than those contained in it, and the testament to remain in force, in so far as not thereby altered.

Codicil.

BE it known to all men, by these presents, *that* I A. B. in C. for the love and favour I have and bear to E. F. in G. *have legated and bequeathed*, as I hereby *legate and bequeath* to her, the sum of — pounds Sterling yearly, during her lifetime, to be paid to her by C. D. in A. whom I have by my latter will and testament, dated the — day of — one thousand, &c. years, registered in — the — day of — said year, appointed my executor; with which legacy

gacy I hereby expressly burden my said executor, in the same manner as if the same had been expressed in my latter-will and testament, whereanent I have dispensed, and hereby dispense; *declaring*, nevertheless, my latter-will, and the other rights and dispositions made by me to the said C. B. dated the said ——— day of ——— to stand in full force, according to the respective tenors thereof, except in so far as they are altered by this present legacy. (Clause of registration for preservation, and subscription clause, in common form.)

If the principal testament is not registered, the codicil may be written at the end of it, if there is any blank space, and expressed very shortly, thus :

“ I hereby further legate and bequeath
 “ to E. F. in G. the sum of ——— pounds
 “ yearly, during her lifetime, to be paid to
 “ her

“ her by the said C. B. my executor, no-
“ minated by the foregoing latter-will and
“ testament ; declaring the same to stand
“ in full force, except in so far as altered
“ by this present legacy ; and *I consent to*
“ the registration hereof, along with the
“ within latter-will and testament. *In*
“ *witness* whereof, I have signed these
“ presents, written on the back of the
“ said testament by ——— at C—— the
“ ——— day of ——— one thousand, &c.
“ before these witnesses, H. I. and I. K.
“ both my servants.”

Testaments are good, if holograph, (i. e. written and signed by the testator), and in that case witnesses are not necessary to the subscription : If written by another person, they are. If the testator cannot sign his name, one notary signing for him, before two witnesses, is sufficient, or a minister (in his own parish) before two witnesses,

witnesses, if a notary cannot conveniently be got *. Testaments, if executed where men of skill in business cannot be had, are valid, though not quite formal, if they convey an idea of the testator's intention; but any general defect would be fatal to them, *ex. gr.* the witnesses not seeing the testator touch the pen, in token of his desire to have it signed by the notary-public or minister; and, as there is a particular form of subscription for persons who cannot write, I have here added it, both in Latin and English, either way being equally good.

*De mandato dicti ——— scribere ut
asseruit nescient. pennamque tanger.
ego ——— notarius publicus in
praemissis specialiter requisitus pro
eo subscribo. ———. N. P.*

At

At desire of the said ——— who
declares he cannot write, and
touches the pen, I ——— no-
tary-public, specially called to the
premisses, do hereby subscribe
for him. ——— N. P.

The above is the form used by a nota-
ry-public; and a minister has only, in-
stead of *notary-public*, to say, *minister of*
the parish of ———

It may be thought I have descended too
minutely into particulars in this article of
testaments; but ministers are often called
to write and subscribe them for persons
who cannot write, and have had but little
opportunity of being acquainted with the
forms which are indispensably necessary;
and there are very sensible men who, by
proper helps, may be capable of making
out their own wills, who cannot do it
without

without such helps, though the case should be ever so necessary.

A testament, where it is in part drawn up in the stile of a deed *inter vivos*, such part of it may contain a settlement of heritage, though executors should be named in the testamentary part, or heritage may be settled in a testament, provided the words “give, grant, assign, and dispose,” are put in place of “legate and bequeath,” and it be written on stamped paper, and not executed on death-bed; and these words, *legate and bequeath*, must never be put into conveyances of any thing that is heritable. Where the subjects pertaining to a person consist partly of heritage, as bonds including executors, tacks, &c. as well as moveables,

General Dispositions

Are most frequently made, burdening the person in whose favours the disposition

is

is made, with particular sums to particular persons; and these general dispositions, so far as concern the moveables left, are incomplete rights without confirmation; but exclude the presumption of vitious intromission; which is the unwarrantable intermeddling with the effects of a person deceased, without the order of law, and subjects the person so intermeddling in payment of the debts of the deceased. Formerly, the smallest intromission subjected the person intromitting, such as wearing the person deceased's hat or cane; but the law has now departed from that rigour; and where the thing intromitted with is of trifling value, or proceeds on a probable title, or is by the wife or children, in order to preserve the goods for the benefit of those concerned, it does not subject the person or persons in payment of the deceased's whole debts. The ne-

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cessity

cessity of confirmation may be excluded in general dispositions in the same manner as in testaments.

A form of such general disposition follows.

General Disposition.

I A. B. in C. for the love, favour, and affection which I have and bear to C. B. my eldest son, and for other weighty causes and considerations me hereto moving, *do*, by these presents, with and under the burdens and reservations under-written, *give, grant, alienate, dispoise, assign, and make over to*, and *in favours* of the said C. B. his heirs, executors, and assignees whatsoever, all and sundry goods, gear, debts, sums of money, household-plenishing, corns, cattle, and whole other moveable goods and gear, of whatever kind and denomination the same be, that shall
be

be pertaining and belonging, or due and addebted to me at the time of my death, by whatever person or persons, by bonds, bills, decreets, accompts, promissory notes, or any other manner of way whatsoever, with the whole grounds and instructions of the said debts, and all that has followed, or may follow thereupon; *and in like manner*, all and sundry lands, heritages, tenements, heritable bonds, adjudications, tacks, and whole other heritable subjects also pertaining and belonging to me at the time of my death, with the whole rights, title-deeds, and securities of the said heritable subjects, grounds thereof, and whole clauses therein contained (a); with and under the burden of payment of all my just and lawful debts, death-bed expences and funeral charges; and also, with and under the burden of paying to D. B. my second son, the sum of seventy

pounds Sterling, and to E. and F. B.'s, my daughters, the sum of fifty pounds Sterling each, as their share of the subjects above conveyed; and failing any of the saids D. E. and F. B.'s by decease before uplifting the said sums, to the survivors or survivor, the share of the person so deceasing equally among them; the one half of the aforesaid three principal sums payable at my death, and the other half at the end of one year thereafter, together also with the due and ordinary annualrent of the said three principal sums from the time of my death, and thereafter ay and while payment of the same, with one fifth part of the said principal sums of penalty in case of failzie (*b*); *reserving* always to me my liferent-right and use of the subjects above disposed, during all the days of my lifetime; and full power, faculty, and liberty to alter these presents,

in

in whole or in part, at any time in my life, and even upon death-bed. *Surrogating* and *substituting* the said C. B. with and under the burdens and reservations above written, in my full right and title of the premises, and whom I hereby *nominate* and *appoint* to be my sole executor, with full power to him, and his forefairs, immediately upon my death, to intromit with the subjects hereby conveyed, receipts, discharges, and conveyances, to grant, that shall be sufficient to the receivers, compone, transact, and agree thereanent, and generally every other thing anent the premises to do that I could have done myself while in life; *but declaring*, that any list or inventory of my personal estate above mentioned, that shall be subscribed by me at any time in my lifetime, as relative hereto, shall be taken and deemed as a part hereof, and exclude the necessity.

cessity of confirmation (c). *And moreover,* conform to the powers vested in me by law, I hereby *nominate, constitute, and appoint* G. B. in H. M. V. in R. and Q. R. in S. to be tutors and curators to such of my children as shall be minors at the time of my death, any two of whom a quorum; declaring, that they shall not be liable for omissions, but for their own actual intromissions in the execution of the said office, and not jointly for one another; *and I consent* to the registration hereof in the books of council and session, or others competent, therein to remain for preservation, and, if needful, that all execution necessary, in form as effects, pass hereon, and thereto constitute

my procu-
rators, &c. In witness, &c. &c.

This must be written on stamped paper:

la

In case the person making such general disposition have a wife, and is bound by contract of marriage to pay her an annuity, and has granted bonds of provision to the younger children, it will be necessary, instead of what is in the preceding form betwixt the letters (a) and (b) to put in what follows: ‘ *Providing* always, that the
‘ said C. B. my son, shall be bound and
‘ obliged, as by acceptation hereof he
‘ binds and obliges himself, his heirs, ex-
‘ ecutors, and successors, to pay all my
‘ just and lawful debts, childrens provi-
‘ sions, funeral charges, legacies, and e-
‘ very other debt that I shall be justly
‘ resting and owing at the time of my
‘ death, and to perform all engagements
‘ by contract, or otherwise, that I shall be
‘ bound in at the time; *reserving* to J. L.
‘ my well-beloved spouse, such share of
‘ my said moveables as are already dis-
‘ poned

‘poned to her, or may be disposed to
‘her, at any time hereafter, which the
‘said C. B. binds and obliges him, and
‘his forefairs, to warrant at all hands,
‘and against all deadly, and to free and
‘relieve her of all debts, and incumbran-
‘ces whatsoever, that may in any ways
‘affect the same, and particularly, without
‘prejudice to the said generality, the said
‘C. B. binds and obliges him, and his fore-
‘fairs, to content and pay to the said J.
‘L. my beloved spouse, the liferent pro-
‘visions granted by me to her in the con-
‘tract of marriage betwixt her and me,
‘or of such liferent provision as shall be
‘made by me in her favours, at any time
‘in my life; and also, to content and pay
‘to D. B. my second son, the sum of —
‘and to E. and F. B.’s my daughters, the
‘sum of ——— each, provided to them
‘by bonds of provision of this date, sub-
‘scribed

‘scribed by me, or such other sums as I
‘shall hereafter provide them in by any
‘subsequent deed, and that at the terms
‘and on the conditions prescribed by the
‘said bonds of provision, or any other
‘security to be hereafter granted by me
‘to them, *with* and *under* which express
‘provision, burden, and reservation, these
‘present^s are granted by me, and accepted
‘by the said C. B. and no otherwise.’

Reserving, &c. surrogating, &c. with and
under the provisions, burdens, and refer-
vations above written, in my full right, &c.

In this case, where the provisions to the
children are in separate writings, it would
be ridiculous to insert the above clause of
nomination of tutors and curators, you
may in that case leave out what is between
letter (c) and the clause of registration.

I shall, in the next place, give you the
form of bonds of provision, and some few
other

other writings relating to the settlement of people's affairs.

Simple Bond of Provision to one Child.

I A. B. in C. for the love, favour, and affection I have and bear to D. B. my son, *bind* and *oblige* me, my heirs and successors, to make payment to him, his heirs and assignees, of the sum of one hundred pounds Sterling, and that at the first term of Whitsunday or Martinmas after my death, with twenty pounds Sterling of penalty and liquidate expences in case of failzie, and legal interest of the said principal sum yearly, termly, and proportionally thereafter, during the not-payment; and consenting to the registration, &c.

Bonds of provision are also written on stamped paper.

Bond

*Bond of Provision to a Man's Younger
Children.*

I A. B. in C. for the fatherly love and affection I have and bear to D. E. and F. B.'s, my younger children, *hereby bind* and *oblige* me, my heirs, executors, and successors whatsoever, to make payment to my said children of the respective provisions under written, viz. to the said D. B. the sum of — pounds; to the said E. B. the sum of — pounds; and to the said F. B. the sum of — pounds, all Sterling; and that at the first term of Whitsunday or Martinmas next after they attain to their respective ages of seventeen years, or their lawful marriage, which of the two shall first happen, with a fifth part more of their respective provisions of penalty, and liquidate expences, in case of failzie,

failzie, together also with the due and ordinary annualrents of the said principal sums, yearly, termly, and proportionally, during the not payment, after the respective terms thereof above written; *and I bind and oblige me, and my foresaids, to educate, aliment, and maintain the saids D. E. and F. B.'s, according to their station and rank in life, until the respective terms of payment of their said provisions; and it is hereby declared that the above sums shall be in full satisfaction to the saids D. E. and F. B.'s, my children, of all bairns part of gear, portion-natural, legitim, executry, legacies, or any other thing whatsoever they, or either of them, can ask, claim, or demand, by or through my decease, or that of J. L. their mother, whenever the same may happen; declaring also, that, in case I shall happen to assign bonds to the saids D. E. and F. B.'s my children,*

children, or either of them, or to lend out money, and take security in their, or either of their names, then, and in that case, the sums contained in the said bonds so assigned, or in the bonds to be conceived in their favours, shall be imputed in payment of so much of their respective provisions above written, and this present bond so far extinguished; *providing* also, as it is *hereby* expressly *provided* and *declared*, that although, by the conception of this present bond, their respective provisions be payable at their respective ages of seventeen years, or lawful marriage; yet, if any of my said younger children shall happen to die before they arrive at the said age of seventeen years, or their lawful marriage, then, and in that case, the portion of the child or children, so deceasing, shall fall, accresce, and belong to the survivors or survivor of my children,

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equally

equally among them ; and, in case of any my said younger children shall happen to die during their minority unmarried, tho' after the age of seventeen years, the portion of the child so deceasing shall also fall, accresce, and belong to the survivors or survivor of my said children, without prejudice to my said younger children, or any of them, to assign, dispose, or test upon their respective portions above written, after their arriving at the said age of seventeen years, or their lawful marriages, though not arrived at the age of twenty-one years complete. *Upon* all which express provisions and conditions above written, these presents are granted allenarly, and no otherwise ; *reserving always* full power to me, at any time during my life, and even on death-bed, to alter, innovate, or change this present bond, and to augment or diminish the said provisions at pleasure,

pleasure, and that by a writing or declaration under my hand, which is hereby declared shall be sufficient for that effect; but, in case I shall not happen to alter the same, and that it shall be in my custody at the time of my death undelivered to my said children, or any person for their behoof, I hereby declare the same shall have the effect of a delivered evident, with the not delivery whereof I hereby dispense for ever; *and consent* to the registration, &c. for preservation, &c.

Bond of Provision to Younger Children, in implement of Contract of Marriage.

I A. B. in C. *considering* that, by contract of marriage entered into between J. L. daughter of W. L. in M. and me, da-

ted the ——— day of ———, one thousand, &c. years, I obliged myself, my heirs and successors whatsoever, to pay to the child or children to be procreated betwixt me and the said J. L. the sum of ——— pounds Sterling, and that at the first term of Whitsunday or Martinmas after my decease; *reserving power* to me to divide the said sum among my said children, as I should think proper, by a writing under my hand, as the said contract of marriage, containing several other clauses, bears; *and being desirous* to settle and divide the said provisions by the proportions following, *do hereby bind and oblige* me my heirs, executors, and successors whatsoever, &c. (as above) and that at the said first term of Whitsunday or Martinmas after my decease (*a*) with ——— money of penalty and liquidate expences in case of failzie, together also with the due and ordinary annualrents,

nualrents, &c.; and I bind and oblige me, and my foresaids, to educate, &c.; and it is *hereby declared*, that the above sums shall be in full, &c.; declaring also, that, in case I shall happen to assign bonds, &c.; *provided* also, as it is hereby expressly *provided and declared*, that, in case any of my said children shall happen to die after my decease, during their minority, unmarried, the portion of the child or children so deceasing, shall fall, accresce, and belong, to the survivors or survivor of my children, equally among them, without prejudice to my said children, or any of them, after the term of payment, to assign, dispose, or test upon their respective portions above written, though not arrived at the age of twenty one years complete; upon all which express provisions, &c.; *reserving*, &c. (as above).

The contract sometimes bears the pay-

ment of the childrens provisions to be
 “ at the first term of Whitsunday or Mar-
 “ tinmas after the decease of the said J.
 “ L. and me, the longest liver of us two,”
 which will make a trifling variation in the
 term of payment of the provision, if the
 wife is not dead at the time of granting
 the provision; in which case the above
 will answer; in the other, it is only at
 letter (a), “ And the decease of the said
 “ J. L. the longest liver of us two.” The
 obligation for aliment being till the term
 of payment, makes it little worse for the
 children.

In case the person making such provi-
 sions thinks of enlarging the provisions,
 he may first narrate the contract, and after
 the word *bears*, add, “ *And seeing* that the
 “ foresaid sum of — pounds Sterling is
 “ by far too small a provision for my said
 “ children, and nowise suitable to their
 “ station

“station and rank in life, *and that* it is my
“intention *not only* to implement the ob-
“ligations incumbent on me by the said
“contract of marriage, *but also* to provide
“my children in suitable provisions: *There-*
“fore, *do hereby bind and oblige me,*” &c.

Bond of Annuity to a Wife.

Where there has been no contract of marriage between the husband and wife, settling an annuity upon her in case of her surviving him, and he wants to provide her in one, and it is more agreeable to the inclination of parties that this be done by a separate deed than in a general disposition to the eldest son, the following form will serve the purpose.

I A. B. in C. *considering* that there has been no contract of marriage between me
and

and J. L. my beloved spouse, or no provision made for her in the event of her surviving me; *therefore*, I hereby *bind* and *oblige* me, my heirs and successors whatsoever, in the event foresaid, to pay to the said J. L. an yearly annuity of ——— pounds Sterling, and that at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment thereof at the first of these terms which shall happen after my decease, and so forth yearly and termly thereafter during her life time, with ——— money foresaid of penalty and liquidate expences for each term's failzie, and annualrent of the said annuity from and after the respective terms of payment, during the not payment thereof: *As also*, I *bind* and *oblige* me, and my foresaids, in the foresaid event of the said J. L. surviving me, to make payment to her, in lieu of mournings,

ings, of —, and that at the first term of Whitfunday or Martinmas after my decease, with — like money of liquidate penalty in case of failzie, and annual-rent thereafter during the not payment. *And moreover*, in the event foresaid, I hereby *dispone, assign, and make over to and in favours of the said J. L.* one half of all my household furniture and plenishing, of whatever kind or species the same be, and that free of all debts or burdens whatever; with power to her, immediately upon my decease, to intromit with, and dispose upon, the said half of the foresaid moveables; which provisions before mentioned, made in favours of the said J. L. she hereby accepts of, in full payment and satisfaction of all terce of lands, third or half of moveables, and every other thing which she can claim in and by my decease, unless I should at any time hereafter think fit to
make

make further provisions in her favour;
and I consent to the registration hereof,
&c. for preservation, &c.

Nomination of Tutors and Curators.

Having been thus full upon the transmission of the property of means and effects from the dead to the living, I come now to nomination of tutors and curators, which is a power also inherent in a testator, or disponent by disposition to take effect after death, to name persons to manage, or assist in the management of such means and effects, till the persons vested in the property of them be capable of managing them themselves; and this power must be exercised sixty days preceding the death of the person making such nomination, to have its full effect.

Nomination,

*Nomination, by a Father, of Tutors
and Curators to his Children.*

I A. B. in C. *considering* that J. B. R. B.
and W. B. my children, may happen to be
within the years of pupillarity and mino-
rity at my decease, and reposing full con-
fidence in the fidelity and friendship of
the persons after named, *do* therefore here-
by *nominate* and *appoint* J. L. my spouse,
C. B. in A. my brother-german, D. E. in
F.; G. H. in J.; and J. K. in L. to be
tutors and curators to my said children
during their respective pupillarities and
minorities; *declaring* any three of the said
tutors and curators to be a quorum while
three remain; and, failing that number,
by decease or non-acceptance, the survivor
or survivors of those who shall accept (*a*);
with

with full power to the said tutors and curators, or their quorum foresaid, to manage the whole means and estate, and direct the education of my said children, during their said pupillarities and minorities, and to intromit with, and uplift their fortunes and provisions, or such part thereof as they shall see necessary, and employ the same for their utility and profit, in terms of the settlements made, or to be made, by me thereof, and to appoint factors, with reasonable salaries, for whom they shall be no further accountable than that they were held responsible at the time of their appointment; and, generally, every other thing to do concerning the premises, as freely in all respects, as any tutors or curators may do by the laws of Scotland. *Provided and declared* always, that the said tutors and curators shall not be liable for diligence, or for omissions in
any

any sort, nor jointly for one another, but only each for his or her own actual intermissions; and I consent to the registration hereof, &c. for preservation, &c.

The following clause is sometimes added at letter (a): "The said —, while in "life, being always one, and *sine qua non*." Without this person's concurrence, in this case, no act is valid. The office of a female tutor or curator falls by her marriage; so, if the wife is named *sine qua non*, it will be necessary to say, "while a "widow, and in life," &c.

Though the person making the above nomination should not live 60 days after, it would still be effectual, simply as a nomination with regard to the *tutors*, if they inclined to accept; but not to free them from omissions, or diligence, or being liable

R

able

able for one another. It is thought it would not be effectual as to the curators, as the father, before the act 1696, has no power of naming curators to his children; and the act makes the two offices very distinct as to the acceptance; they might accept as tutors, and decline as curators; and mentions the curators to be named in *liege poustie*, (or 60 days preceding the person's death nominating them). The tutor, in this case, would be in no worse situation than a tutor of law, or dative, to be after taken notice of, and the nomination would save the expence of serving a tutor of law, or procuring gifts of tutory-dative; and, unless the tutor made some glaring misbehaviour, it would be wrong in the heir to put him to any trouble or inconvenience, merely because the father had not lived a few days longer.

If

If the minor inclined to continue the person so nominate by the father within the 60 days as curator, it might be proper to make a nomination or choice of him, on arriving at the age of 14, in the same way as any other person he would choose; although, in practice, curators named by the father on deathbed will be allowed to act, unless the minor chooses other curators; particularly, if, along with this person, he meant to conjoin other persons in the curatory, it would be necessary to insert him, as well as the rest, in the nomination.

Where there is no nomination, there is room for a tutor of law; and the nearest male relation, on the father's side, to the minor, of 25 years of age, or upwards, is preferred; but the custody of the person is given to the mother, while a widow, until the pupil be seven years old, and

failing her, to the next relation on the mother's side, the law judging the person who is next entitled to the estate more likely to be diligent in preserving the estate than the life of the person who stands between him and it. If the tutor of law inclines to accept, he must serve upon an inquest of 15 sworn men, on a brieve directed to a judge ordinary, as sheriff, steward, or magistrate of a borough. If he let year and day elapse, any person, by applying, may be named tutor-dative. A summons is issued from the exchequer for citing two of the nearest of kin on the father's side, and two on the mother's, which being executed, and no objection lodged by them, a gift of tutory-dative is procured from the Barons of Exchequer; at least, such gifts are null without their consent to the gift, or declaration that they have

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I C.
A. B.

have no objection to it, if no summons be executed.

Where there is no nomination of curators by the father, the minor, when he intends to put himself under the direction of curators, must raise and execute a summons, citing at least two of his next of kin, and all others edictally, to appear before his own judge ordinary, to hear and see curators given. At the time and place of appearance, he offers a formal nomination of those he intends for curators; such of them as are willing to accept, must sign an acceptance, and find caution, upon which an act of curatory is extracted.

Nomination of Curators by a Minor.

I C. B. eldest lawful son of the deceased
A. B. of C. do hereby declare, that I have

R 3

attained

attained to the age of fourteen years complete, and am under twenty-one years; and I hereby *nominate* and *make choice* of Mrs J. L. *alias* B. my mother, widow of the said A. B. G. H. merchant in G. and H. J. writer there, and the survivors or survivor of them three, to be my curators during my minority, *declaring* any two of them to be a quorum, while two of their number remain in life; *and also declaring*, that they shall not be liable for omissions or for diligence, nor jointly for one another, but only each of them for his or her own actual intromissions. *In witness* whereof, these presents are written by _____, and subscribed by me at _____, the _____ day of _____, one thousand, &c. years, before these witnesses, &c.

Both tutors and curators must, previous to their administration, make judicial inventories

inventories of the minor's whole estate, whether consisting of heritage, bonds, or moveable effects. This inventory must be signed by them and the next of kin before the minor's judge-ordinary, one duplicate to be kept by the tutors or curators themselves, another by the next of kin on the father's side, and a third by those on the mother's. If afterwards any other estate or effects come to their knowledge, they must add it to the original inventory in two months, observing the same forms. If the next of kin refuses to concur, they are cited before the judge-ordinary, that he may decree their concurrence; and if they fail to compear, the inventories are made up at the sight of the judge, who also must, in that case, sign the three duplicates. When the tutor or curator is himself one of the next of kin, he must cite the two on father and mother's

mother's side, who are next in degree after himself to the minor.

*Act 1690, c. 26. anent Confirmation of
Testaments before mentioned.*

“ Our Sovereign Lord and Lady, the
“ King and Queen's Majesties, and three
“ estates of parliament, considering the
“ great vexation occasioned to their Ma-
“ jesties leidges by commissars and their
“ clerks, fiscals, and officers, charging
“ them to confirm the testaments of their
“ decaest relations, do hereby discharge
“ and forbid, in all time coming, all
“ commissars, and their fiscals, clerks,
“ and officers, to charge, pursue, or re-
“ quire any person to confirm the testa-
“ ment, or give up inventory of the goods
“ of any other persons defunct, except at
“ the instance of the relict, bairns, nearest
“ of

“ of kin, and their tutors and curators,
“ or of a creditor ; declaring all charges,
“ pursuits, and executions, otherways
“ made and given, to be void and null.
“ And further, their Majesties, with con-
“ sent foresaid, declare, that, where spe-
“ cial assignations and dispositions are
“ lawfully made by the defunct, though
“ neither intimate nor made public in his
“ lifetime, they shall be yet good and va-
“ lid rights and titles to possess, bruik,
“ enjoy, pursue, or defend, albeit the
“ sums of money, or goods therein con-
“ tained, be not confirmed ; without pre-
“ judice always to the competition of cre-
“ ditors and others, and of their rights
“ and diligences as formerly, before the
“ making hereof.”

Ad

Act 1584, c. 133. whereby it is statute that Ministers shall not be judges, nor exercise any uther ordinar office that may abstract them fra their office.

“ THE Kingis Majestie, and his three
 “ estaites assembled in this present parlia-
 “ ment, earnestly desirous that all his lo-
 “ ving and gude subjectes shall be faithful-
 “ lie instructed in the doctrine of their
 “ salvation, and that the ministers of God’s
 “ word and sacrament may the better and
 “ mair diligently attend upon their awen
 “ charges and vocation: Therefor statutis
 “ and ordainis, that all the saidis ministers
 “ shall faithfullie await thereupon, to the
 “ comfort and edification of the flockes
 “ committed unto them; and that none
 “ of them presently being in that function,

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“ or that fall be admitted theirto in time
“ cumming, fall in onyways accept, use,
“ or administrate ony place of judicature
“ in whatsumever civil or criminal causes,
“ nocht to be of the Colledge of Justice
“ commissioners, advocates, court clerkes,
“ or notaris, in ony matters, (the making
“ of testaments onely excepted), under
“ the pain of deprivation fra their bene-
“ fices, livinges, and function : And gif
“ they failzie herein, being called, tried,
“ and adjudged culpable be their ordi-
“ nars, or be the King’s Majestie’s com-
“ missioners in ecclesiastical causes, they
“ fall then tine their saidis benefices and
“ livinges, and uthers qualified persones
“ fall be presented and provided thereto,
“ as gif they were naturallie dead.”

Before the reformation the ecclesiastics
had rendered the office of a notary scarce-
ly

ly worth holding by any person but themselves. The spiritual notaries appointed by the Pope having pretended a right to practise both in matters civil and spiritual, whilst they excluded the lay notaries appointed by the King from all spiritual affairs; under which description they contrived to include almost every part of the office. It also required some degree of learning, and the clergy were almost the only learned persons. Many of the established clergy being notaries, the meaning of this act, therefore, seems to have been, that none of these clergymen who, prior thereto, were admitted notaries, or might afterwards admit, should use that office, except in the case of testaments; not to confer the right of acting as notaries, in that case, on ministers not admitted notaries; but it happened, as might have been expected, that scarce any of them

them were afterwards admitted, this being so small a part of the office : Their right at present to act in that capacity in testaments, seems to be founded on the practice occasioned by the urgency of the case, rather than on the foresaid act of parliament.

S

T I T.

T I T. VII.

Contracts of Marriage.

BY marriage, a society is created between the married pair, which draws after it a mutual communication of their civil interests, in as far as is necessary for maintaining it, which is called a *communio of goods*, and which lasts while the marriage is undissolved by death or divorce. Heritable rights are not brought under the communion of goods, such as a land estate, or bonds bearing interest. It is only moveables, or the yearly produce of heritable subjects during the marriage, that become common to husband and wife. Though these goods are a common stock, yet the husband has the sole right

right of management, called *jus mariti*, by which he can sell or give them away, and they are affectable by his debts; so that the goods brought by the wife are, by the marriage, without any other conveyance, transferred to the husband; and this right acquired by the husband is equal to an assignation. But a person conveying an estate or effects to the wife, may do it so as to exclude this right; or the wife may reserve her right entire by contract of marriage, in which the husband renounces his right in whole or in part. From the above communion of goods are excepted clothes and jewels pertaining to the wife. The husband, by marriage, is perpetual curator to the wife, so that no suit can proceed against her, without calling the husband for his interest. The above right is burdened with any debts contracted by the wife prior to the marriage,

and it is the husband only who is liable in personal diligence; for the wife, during the marriage, is free from all such diligence.

I have formerly treated of the provisions which the law allows to widows and children; under the head of Testaments, so far as they relate to moveables; and here I shall make a few observations on legal provisions, relating to heritage, where no contract is made. The widow in that case is entitled to a third of the rents or yearly produce; and if there is one widow who draws this, and there happens to be a second widow before the first widow's death, this last is entitled to a third of the remaining two thirds till the death of the first, after which she gets the full third, and the heir the full two thirds, as where there was no other widow. This right of the wife's to a third of the rents or yearly produce

produce of lands, as also of infeftments of annualrent and other heritage wherein the husband was infeft, is called *terce*, which, if she does not claim in her lifetime, her heir or executor cannot after her death; and it is restricted by every thing that divests the husband of the fee, so far as it extends; but a disposition, or heritable bond, without infeftment taken on it, does not affect the *terce*. She cannot be served to her *terce*, but of the subjects whereof the husband stood infeft; and if the husband omitted to obtain himself infeft in his lands, she must in that case raise an action for it.

The husband, on the other hand, by the courtesy of Scotland, liferents all the wife's heritage in which she was infeft, if there was a child of the marriage born alive; but a marriage of the longest continuance gives no right without issue, and he is

subjected to the yearly interest of the debts upon bond, in the same way as while the marriage subsisted. It is only a continuation of the *jus mariti*, or a right of administration to the heir or heiress. If the estate gives a qualification, he can vote for a member of parliament. The law being so careful to provide all parties, it seems strange so many contracts should be used in practice, particularly with persons possessed of heritage; for more disputes have arisen relating to the meaning of contracts of marriage, than as to the legal provisions where there were no contracts; and it is to be observed, that these legal provisions only take effect where there is none; for a contract, however absurd, is the rule of judgment in case of dispute. Indeed, where there is any danger of the husband failing in his circumstances, it is better to have a contract; as the provisions in contracts of marriage

marriage in favours of the wife are considered as onerous in a dispute with creditors, and where she is infest in her jointure, it will be effectual in the same manner as any other debt secured by infestment, unless she consent to the husband's security on the lands granted to posterior creditors.

The provisions in contracts of marriage in favour of heirs of the marriage cannot be hurt by gratuitous deeds; but the father may contract debt or sell the subject, unless where he has obliged himself to infest the heir in the lands, or make payment of the sum provided against a day certain, or when the heir attains a certain age; or if the father be restrained from contracting debt; for such rights when perfected by infestment, or secured by inhibition, are effectual against the posterior deeds of the granter, though onerous.

But

But these observations concerning heritage I only make in passing, as I do not mean to enter into all the intricacies of settlements relating to it, where it is generally found convenient to have a man of business.

In moveables, it is thought proper a sum be contracted to be paid to the children. But this general provision will not be effectual as a debt in favours of the children, unless it be particularly applied to each child, by afterwards granting bonds of provision in implement thereof to the child or children actually existing; for a proper debt is thereby created in favour of the child or children, whether such child be the heir of a marriage or not; which will be effectual against the father and his heirs, and not reducible at the instance even of his prior onerous creditors, if he was solvent at the time of granting
such

such bond: But the burden of the proof lies upon the child. Provisions to children in contracts of marriage, where such application of them is not made, are postponed to every onerous debt of the grantor, even those contracted afterwards. Where the wife brings a portion, she chuses to have a certain sum settled upon her by way of annuity, as being in general better suited to the state of widowhood; and to have her interest so fixed as to prevent any disputes which are so frequent among relations concerning these matters; and certain persons named as trustees of her rights, at whose instance action, if necessary, may proceed against the husband: Sometimes, too, a clause renouncing the *jus mariti* is necessary.

There is generally a clause declaring the provisions to be effectual to both parties, though the marriage should be dissolved

solved by death within year and day ; the law in this case being, that all rights granted in consideration of a marriage become void, and return to the same condition in which they stood before it, unless there be a living child of the marriage heard cry, or the marriage have subsisted year and day.

There is another case in which contracts are necessary. Where the husband and wife have lived long childless, without any contract, and intend that the longest liver should either enjoy the property of the whole goods in communion, or at least liferent them.

I have added examples of contracts in all the above cases relating to moveables, and have anticipated the observations concerning contracts of marriage in so many cases, that it will be necessary to say little more in the way of observation upon them.

Contract

*Contract of Marriage, providing the
Wife in an Annuity after her Hus-
band's decease.*

*It is contracted, agreed, and matrimo-
nially ended, betwixt the parties follow-
ing, viz. A. M. in N. on the one part, and
B. C. daughter of the deceased A. C. of
E. on the other part, in manner after men-
tioned: That is to say, the said parties
have accepted, and by these presents ac-
cept, each of them of the other, for their
future spouses, and promise to solemnize
the holy bond of matrimony with all con-
venient speed. In contemplation of which
marriage, and for the causes after expres-
sed, the said A. M. binds and obliges
himself, his heirs and successors whatso-
ever, to content and pay to the said B. C.
in*

in case she survive him, an yearly annuity of twenty pounds Sterling, and that at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment thereof at the first of these terms which shall happen after his decease, for the half year immediately preceding, and so forth yearly and termly thereafter, during her lifetime, with four pounds, money foresaid, of liquidate expences, for each term's failzie, and annualrent of the said annuity from and after the respective terms of payment, during the not payment thereof. And the said A. M. obliges himself, and his forefairs, to pay to the child or children to be procreate betwixt him and the said B. C. the sum of ——— pounds Sterling, and that at the first term of Whitsunday and Martinmas after the decease of him and the said B. C. the longest liver of them

two,

two, with ——— pounds, like money,
of liquidate expences, in case of failzie,
and annualrent of the said principal sum
from and after the said term of payment,
during the not payment of the same; *re-*
serving power to the said A. M. to divide
the said sum of ——— pounds Sterling
among the said children, as he shall think
proper, by any writing under his hand;
and failing of such writing, then, and in
that event, the same is to be equally di-
vided amongst them; and in the event of
the said B. C. her surviving the said A.
M. and that, at the time of his decease,
there is no child or children existing of
the said marriage, then, and in that event,
he hereby *dispones, assigns, and makes over*
to, and *in favours of,* the said B. C. her
heirs, executors, and assignees, his whole
household furniture and plenishing, of
whatever kind or species the same be;

T

and

and in case of a child or children existing of the said marriage at the time of his decease, then, and in that event, he hereby *dispones, assigns, conveys, and makes over to, and in favours* of the said B. C. and her forefaids, the one just and equal half of the said household furniture and plenishing, and that free of all debts and burdens whatever, with power to her, immediately upon his decease, to intromit with, and dispose upon the said whole, or one half, in the respective events foresaid; which provisions before mentioned, made in favours of the said B. C. she hereby accepts of in full payment and satisfaction of all terce of lands, third or half of moveables, and every other thing which she can claim in and by the said A. M. his decease, or which her executors, or nearest in kin, can anywise demand or claim in and by her own decease, in case she
prede.

predecease the said A. M. *For which causes, and of the other part, the said B. C. hereby makes, constitutes, and ordains the said A. M. his heirs and donors, her irrevocable cessioners and assignees in and to all debts and sums of money, goods, and other effects due and belonging to her, or whereunto she shall happen to succeed during the subsistence of the said marriage. Providing and declaring, that, though the said marriage shall dissolve within year and day after the solemnizing thereof, by the death of either party, or without a living child heard cry, yet this present contract shall subsist and be effectual, any law or practice to the contrary notwithstanding. And, lastly, it is agreed, that execution shall pass upon these presents, at the instance of A. C. merchant in G. and F. G. writer there; and failing any one of them by decease, at the*

instance of the survivor, and his heirs, against the said A. M. for implement of the provisions before mentioned, made in favour of the said B. C. *And both parties consent* to the registration hereof in the books of Council and Session, or others competent, therein to remain for preservation, and, if needful, that all execution necessary in form, as effects, pass hereon; and thereto *constitute*

their

procurators, &c. In witness whereof, &c.

Where the Lady has been left a sum of money by bond or provision, the contract will run thus, as to the part of it whereby she conveys her effects to the husband.

“For the which causes, and of the other part, the said B. C. assigns and disposes

“ 10

" to the said A. M. his heirs, executors,
 " or assignees, the sum of five hundred
 " pounds Sterling of principal, with a fifth
 " part of said principal sum of penalty,
 " and bygone annualrents thereof in time
 " coming, contained in a bond of provi-
 " sion granted to her by the said deceased
 " A. B. her father, dated the —— day of
 " ——, one thousand, &c. years, with
 " the said bond itself, and all that has
 " followed or may follow thereon; *as al-*
 " *so, assigns and disposes* to the said A. M.
 " all debts, sums of money, or others that
 " she can ask or claim by or through the
 " decease of the said A. B. her father, or
 " may hereafter fall or accresce to her by
 " the decease of E. K. her mother; *sur-*
 " *rogating and substituting* the said A. M.
 " and his forefaids, in her full right and
 " place of the same for ever; which as-
 " signation she binds and obliges herself

“ to warrant from her own fact and deed
 “ allenary; and she has instantly deliver-
 “ ed to him the said bond, to be kept and
 “ used by him, and his foresaids, at their
 “ pleasure, in time coming. *And lastly,*”
 &c. (as before).

Where the bride's father is a party, and
 obliges himself to pay a certain sum with
 his daughter, the contract will be as fol-
 lows.

“ *It is contracted,* &c. betwixt the par-
 “ ties following, viz. A. M. in N. *on the*
 “ *one part,* and B. C. eldest daughter of
 “ W. C. of E. with consent of her father,
 “ and the said W. C. for himself, *on the*
 “ *other part,* in manner after mentioned,”
 and go on, as in the preceding, to, “ *for*
 “ *which causes,* and *on the other part,* the
 “ said W. C. binds and obliges him, his
 “ heirs,

“ heirs, executors, and successors, to satisfy and pay to the said A. M. as dote and tocher with the foresaid B. C. his daughter, the sum of five hundred pounds^s Sterling at the term of Martinmas next, with a fifth part more of penny and liquidate expences, in case of failzie, and legal interest of the said principal sum, from the said term of Martinmas, during the not payment, and that in full satisfaction to the said B. C. his daughter and her husband, of her patrimony, and all that they can or might ask or crave of the said W. C. her father, or his representatives, thro’ his own death, or the death of Mrs A. C. his spouse, any manner of way whatever, excepting good will only.”—

Then follows—clause relating to dissolution within year and day—clause nominating persons at whose instance execution

tion may pass against the husband—and clause of registration, &c.

Where it is intended that the wife's tocher shall not be affectable by the debts or deeds of the husband, or attachable by his creditors, it is thought the following form would answer the end.

Contract of Marriage, the Tocher not Affectable by the Husband's Debts.

It is contracted, &c. That is to say, the said parties having conceived a mutual love and affection for one another, do hereby accept, each of them of the other, for their lawful promised spouse, and bind and oblige themselves to solemnize the holy band of matrimony with each other, with all convenient speed. In contempla-
tion

tion of which marriage, the saids A. B. and E. F. with and under the conditions and declarations under written, *do* hereby assign and *dispose to* and *in* favour of each other, and the longest liver of them two in liferent, and the children to be procreate of the marriage in fee; which failing, to the longest liver's heirs or assignees whatsoever, all and sundry goods, gear, corns, cattle, horse, nolt, sheep, household-plenishing, debts, sums of money, and others whatsoever, presently pertaining and belonging, or due and addebted to them, or that may happen to pertain and belong to them at the time of the decease of either of the saids A. B. and E. F. which of the two shall first happen, by any person or persons, by bond, bill, decreet, accompt, or any other manner of way, with the grounds and instructions of the said debts themselves, and all that
has

has followed, or is competent to follow thereupon. And it is hereby expressly conditioned, that the said parties shall, betwixt and the — day of —, one thousand, &c. years, uplift two hundred pounds Sterling of the proper means and effects of the said E. F. and lay out the same upon a bond by a responsal person or persons, bearing interest, and take the same payable (*a*) to the said A. B. and E. F. and the longest liver of them two in life-rent, and to the child or children to be procreate of the marriage in fee; which failing, to the longest liver's heirs or assignees whatsoever. *And* the said A. B. hereby *resigns* and *renounces* his *jus mariti*, and all other active right and pretension competent to him by law, in consequence of such marriage, over the personal means and effects, debts and sums of money pertaining and belonging to the said E. F. to

the

the extent of the said sum of two hundred pounds Sterling, *declaring* the above sum not to be affectable by the diligence of the creditors of the said A. B. and that he shall not have it in his power to uplift all or any part of it, without the consent and approbation of the said E. F.; and how often the said sum, or any part of it, shall be uplifted by the said parties, they oblige themselves as often to bestow and employ the same, at the sight, and by the advice of W. V. in R. and X. Y. in Z. in favour, and to the effect above mentioned.

And farther, it is hereby *agreed*, that diligence shall pass hereon, at the instance of the saids W. V. and X. Y. against the said A. B. for implementing his part of the contract, so far as he is thereby bound in favour of his said future spouse, and the child or children to be procreate of the said marriage, if any be. *And, lastly*, it is

is hereby *covenanted and agreed*, that, although the intended marriage should dissolve by the death of either party within year and day after the celebration thereof, the above articles shall however subsist, and continue to have the desired effect, in the same manner as if no such dissolution had happened, any law or practice to the contrary notwithstanding. And the said parties *consent to the registration, &c.*

By the present practice, which is more after the English form, the bond is commonly taken payable to a trustee, for the ends and purposes mentioned in the contract: And indeed, as where the husband is a bad oeconomist, there is some danger of his prevailing on the wife to concur in uplifting the money, and then spending it, it may in this case at letter (a), be “payable to W. V. of X. as trustee, to the use and behoof of the said A. B.” &c.

And

And there may be left out, "and that he
"shall not have it in his power to uplift,"
&c. to "And farther," &c.

Postnuptial Contracts.

A postnuptial contract is either made immediately after marriage, and similar to an antenuptial one, except in the narrative; or, where persons having lived long together, and had no children, by way of mutual assignation to the longest liver. The narrative, in the first case, is thus:

It is contracted, agreed, and finally ended
between the parties following, viz. A. B.
in C. *on the one part*, and E. F. his spouse,
on the other part, in manner under written,
that is to say, *Whereas* the said A. B. and

U

E.

E. F. are already married, yet there having been no contract hitherto entered into between them, the said E. F. is not properly secured in any jointure, nor are the children that may happen to be procreated provided according to the agreement of parties before and at the time of the marriage. *In consideration* whereof, and of the tocher after mentioned, and in implement of the above agreement, &c. (as in any of the above forms which may be most suitable).

In the other case it will be,

It is contracted, &c. that is to say, *whereas* there has been no contract of marriage ever entered into betwixt the said spouses, nor any provision made by the said A. B. to his spouse, in the event of her surviving him; and *whereas* there are no children procreated and existing betwixt them the said spouses, they have thought it just and reasonable

reasonable to enter into the contract under written; *therefore* it is agreed betwixt them, that, in the event of the death of either of the said parties, the survivor shall, during all the days and years of his or her lifetime, after the other's decease, *possess* and *enjoy* the liferent-use and benefit, *not only* of the current tack of G. during the whole space thereof to run from and after the death of either of the parties, *to* which the said A. B. hereby *assigns* his said spouse in the event of his decease before her; *but also*, all the moveable goods and gear, corns, cattle, horse, nolt, sheep, insight and household plenishing, utensils, and domicils, habiliments of their bodies, together with all and sundry debts, and sums of money, due and addebted to them, or either of them, by whatsoever person or persons, by bond, bill, decreet, tack, ticket, accompt, promissory note, or any other

manner of way whatsoever ; and that, after the death of the longest liver of the said spouses, the foresaid whole moveable effects, with the benefit of the foresaid tack, if any space thereof shall be then to run, shall fall, accresce, pertain, and belong to the nearest of kin on both sides, equally betwixt them, hereby expressly secluding the nearest of kin from any claim or interest in the subjects before mentioned, during the lifetime of either of the said spouses ; declaring that it shall be in the power of the survivor of the said spouses to intromit with, use, and dispose of the property of any of the said subjects, if they shall have necessity for so doing towards their support and sustenance; but that it is nowise here intended that it shall be in the power of the said spouses to dispose of any of the foresaid effects purpose-ly to disappoint the succession of their nearest

nearest of kin equally among them (a);
and, lastly, the said A. B. recommends to
 the said E. F. to take the advice of G. H.
 in J. in the management of her affairs;
and the said parties consent to the registra-
 tion hereof in the books of Council and
 Session, or others competent, therein to
 remain for preservation, and, if needful,
 that all execution necessary, in form as ef-
 fairs, pass hereon; and thereto constitute
 procurators,
 &c. In witness whereof, these presents, &c.

As such settlement gives the nearest of
 kin a right, after the decease of the hus-
 band and wife, it might not be improper
 to put in a declaration, that it should be
 in the power of each of the parties to set-
 tle the succession of their own parts, after
 the decease of both, if such is the inclina-
 tion of parties; as, by the above form,

the nearest of kin might alledge they could not be deprived, by the act or deed of any one of the parties, of such succession as was vested in them by solemn agreement between both. Such clause would come in at letter (a), and might be worded as follows :

“ *And declaring also, that it shall be in*
 “ *the power of either, or each of the said*
 “ *spouses, by any writing under his or her*
 “ *hand, at any time in life, and even on*
 “ *deathbed, to settle and dispose upon the*
 “ *half of the before mentioned subjects,*
 “ *as they shall stand at the time of the*
 “ *decease of the longest liver of the said*
 “ *spouses. Such settlement thereof only*
 “ *to take effect at that period.*”

Sometimes, where the subject is but small, and the parties consider themselves under greater obligations to each other than

than to the nearest of kin, it is left unconditionally to the longest liver, his or her heirs and assignees. As such practice is common, I shall add an example.

We A. B. in C. and E. F. spouse to the said A. B. *considering* that, whereas there has been no contract of marriage ever entered into betwixt us the said spouses, nor any provision made by me the said A. B. to the said E. F. my spouse, in the event of her surviving me; *and whereas* there are no children procreate and existing betwixt us, we have thought it just and reasonable to enter into these presents in manner under written. *Therefore* we the saids A. B. and E. F. spouses, *do hereby*, with one consent, *assign, dispose, and make over to and in favours of each other in life rent, during all the days of the lifetime of the longest liver, and to the longest liver's heirs,*

heirs, executors, and successors whatsoever, in fee, all and sundry moveable goods and gear, corns, cattle, horse, nolt, sheep, insight and household plenishing, utensils, and domicils, and habiliments of our bodies, together with all and sundry debts and sums of money due and addebt-
ed to us, or either of us, or that may be due and addebt-
ed to us, or either of us, by whatsoever person or persons, by bond, bill, decreet, tack, ticket, accompt, promissory note, or any other manner of way whatever, at the dissolution of the said marriage, by the death of either of us the said spouses; *surrogating* and *substituting* the said longest liver of us two, and the longest liver's foresaids, in the other's full right, title, and place of the premisses, with full power to call for, uplift, and receive the whole debts and sums of money above assigned, and, if needful, to call and
pursue

pursue therefore, as accords to law; to use and dispose upon the property of the said goods, gear, and other moveable subjects above assigned; and generally every other thing thereanent to do that we the said parties could have done before granting hereof; and *consenting* to the registration, &c.

TIT.

T I T. VIII.

Bills and Diligences.

IT is unnecessary here to say any thing of the origin or usefulness of bills; the first is of little consequence to know; the last is evident.

I shall therefore proceed directly to give examples of such bills as are in most common use, with the observations that appear suitable to the examples; only observing, that an additional solemnity has been superadded by some late statutes, which require them to be written on paper paying a stamp duty, otherwise to be void

void and ineffectual. For which see the end of this title.

EXAMPLE I.

Miniaive, August 1. 1783.

One month after date, pay to me or order, in the Coffee-house in Dumfries, twenty-five pounds Sterling, value of

Arthur Bickerstaff.

To Mr Abraham Aker-
braid tenant in Drum-
lawantie. }

Abraham Akerbraid.

This bill, if paid when due, will be given up to the acceptor; and though the giving it up affords a strong presumption of the payment, yet it is proper to get a receipt on the back, thus :

“Received payment of the within bill.”

Arthur Bickerstaff.”

The

The necessity of a receipt will appear evident where the payment is received from a third person, in which case it will be necessary to add, "*from such a one*;" and if it is not upon the very term of payment, to mention the date. A partial payment may be marked thus:

Dumfries, Sept. 1. 1783.

"Received of the within bill fifteen
"pounds Sterling."

The date ought particularly to be mentioned in partial payments, to enable one to calculate the interest; otherwise they will be all held to have been at the term of payment.

Where the drawer chuses to convey a bill to another person, it is done as follows, and is called *indorsation*.

"Pay the contents to Timothy Baxter
"or order.

Arthur Bickerstaff."

If

If for value, add the words, *for value*, and every after indorsation is in the same form. It would not be improper to mention the designation of the person to whom the indorsation is made, though the holder, if of the name mentioned, is presumed to be the person intended.

Some persons sign their names upon the back of their bills, to be filled up either for receipts or indorsations, as occasion may occur. This cannot be recommended; for a third person paying for the acceptor, (to whom he stands indebted, and has on that account promised to retire his bill), may fill up one of these, and make it stand for an indorsation, and indorse it away to a fourth person, to prevent compensation taking place, and the person so indorsing becoming bankrupt, recourse upon him may be lost; whereas, by making out a receipt at giving up the bill,

no such mischief can happen. Compensation is a method of extinguishing mutual obligations, mentioned in treating of receipts and discharges.

If a bill is not paid when due, to the person who holds it as drawer or indorsee, it is necessary to cause it be protested by a notary public, and to get the protest recorded within six months after the term of payment; on which horning may be raised.

In case of an indorsed bill, the indorsee, or person to whom it is last indorsed, may protest it, and raise diligence against the drawer, acceptor, and all preceding indorsees, jointly; but this must be done upon one of the three days immediately following the term of payment, called *days of grace*, (but the practice is not to do so till the last of the three days) otherwise the indorsee must take the acceptor for his debt.

or;

or; where the third day of grace is Sunday, the protest must be taken on Saturday.

If one intends to indorse a bill as it stands, and be no further liable for it, and the indorsee is willing to accept of it on these terms, it is necessary to add to the above form of indorsation the words, "*without recourse.*"

If diligence has been raised on a bill, it cannot afterwards be conveyed by indorsation, but must be done by assignation, a form of conveyance which is written on stamped paper, and incomplete without intimation by a notary-public, or by some equivalent act.

A bill, after it is indorsed or assigned, is considered as *cash* delivered to the onerous indorsee or assignee, and therefore carries right to the sums contained in it, free from all burdens, except those marked on the bill itself. An onerous indor-

fee is he who has instantly paid his money for it, or got it in satisfaction of a former debt. Hence no receipt or discharge by the original creditor in a bill, if written on a paper apart, can defend the debtor from payment a second time to the indorsee, even though the indorsation should be posterior in date to the receipt or discharge. Hence, also, though the bill should be granted without value paid for it, or though the acceptor should have a ground of compensation against the drawer who indorses it away, or, though arrestments should be used at the instance of a creditor of the indorser's, none of these pleas would be good against the indorsee. But, if the debtor should prove, by the indorsee's oath, that he paid no value, or that he paid not the full value for the indorsation, the indorsee is justly considered as but a name, and, therefore, all exceptions

exceptions receivable against the original creditor will be sustained against him.

EXAMPLE II.

A Draft.

L. 40. *Ayr, Aug. 2. 1783.*

At eight days sight, pay to George Griffith, merchant in Glasgow, or order, forty pounds Sterling, value of

Jos. Jenkins.

To Mr Tho. M'Dill mer- }
chant, Port-Glasgow. }

Here it is necessary to present the bill or draft for acceptance; and though the possessor is not bound to present it at any precise day, yet he ought not to keep it up; for it is to be considered, that, by delaying it long, there may be an altera-

tion in the circumstances of the person drawn on. If the draft is accepted, the acceptance must be dated, because the term of payment depends on the date of the acceptance; if refused, it is necessary to protest for non acceptance; and, when the term of payment is come, to take a second protest for not payment, upon which horning may be raised against the drawer. But, where a draft is payable against a day certain, as *against the first of October next, or ten days after date*, it need not be protested for not acceptance till the day of payment; because that day can neither be prolonged nor shortened by the time of acceptance; and if accepted before the term of payment, the acceptance need not be dated. There are, as before observed, with regard to bills, three days immediately after the day of payment, called *days of grace*, within any of which the

the creditor may protest the bill or draft which has been accepted, (though it is the practice not to do it till the last) against all concerned, jointly; for payment, though they do not thereby lose their relief against one another, if they notify the dishonour within three posts, or 14 days after the protest is taken. But if the creditor, after acceptance, neglect to protest for non-payment till after the days of grace are expired, he has none but the acceptor liable.

A draft payable on sight cannot be accepted, but must be paid at presenting; and though the creditor has a discretionary power of presenting it somewhat sooner or latter, he ought not to delay it, as it is to be considered that the person drawn on may have the money ready waiting its being called for, and accident happen to it lying in that situation; and as an addition-
al

al reason for presenting all drafts as soon as convenient, let it be observed, that, in the case of non-acceptance, the protest can only be registered within six months from the date of the draft.

The drawer is liable for interest, in the case of not acceptance, from the date; and in case of acceptance and not payment, all concerned are liable for interest from the day of the draft's falling due, if duly negotiated. Act 1696, c. 36. and 1681, c. 20.

The possessor of a draft is not obliged to take a partial acceptance, but may, in that case, protest for not acceptance.

It is the sum in letters at full length in the body of a bill or draft which is the rule, and not the figures at the top, which are entirely superfluous.

Where bills are made payable at Christmas, Candlemas, Whitsunday, &c. these
are

are held in law to be payable at these terms, new stile.

A privilege is introduced by the bankrupt act 1772, to a person paying for honour of any of the indorsers, or the drawer or acceptor, that, though the bill is not indorsed to him by the indorsee, to whom he paid it, he can raise horning in the same manner as if it had, upon the protest already taken by the indorsee to whom he paid the money; but at applying for the horning he must produce a receipt on the back of the protest, by the protesting indorsee, to whom he paid the money, by *act of honour*, or a missive letter from him, mentioning the dishonour. The form of such receipt is very simple.

Edinburgh, — August 1783.

“ Received by me the within ———,
“ from the also within ———, the
“ sum

“sum of one hundred pounds Sterling,
“being the contents of the bill within
“copied, with two shillings and sixpence
“Sterling, as the expence of this protest
“and act of honour.”

It being declared by the person who thus pays, that he will not pay in the manner the bill is drawn, yet he will pay the same *supra* protest, for the honour of such a one, one of the indorseees, or the drawer, holding nevertheless that person, and the others concerned, liable to him for his reimbursement and recourse; but it is the part of the notary to mention the compearance and declaration, which is annexed to the instrument of protest, and subscribed by the notary, and after it the person who receives payment of the money grants his receipt. Thus, for instance, where a bill does not expressly bear value
in

in the hands of the person drawn on, though a presumption lies that he is not the drawer's debtor, and consequently an action of recourse would be competent to him against the drawer for repayment; yet few persons drawn upon, who are not possessed of the drawer's effects, adventure, on the faith of this presumption, to accept any draft of his, till they have suffered it to be protested against them for non-acceptance, after which they may accept it *supra* protest, for the honour of the drawer, without any danger of losing their recourse against him; or where it is drawn bearing value to be in the hands of the person drawn on, and he has objections against that being the case, either in whole or in part, and does not wish to disoblige the drawer, or put him to inconvenience, he may allow it to be protested, giving for a reason, that he will not accept it as drawn,

drawn, or that he has not value, and afterwards pay it for honour of the drawer, or, the last indorser may pay the indorsee, to whom he was addebted, and get the horning against the acceptor, drawer, and prior indorsers, nearly as if it had not been indorfed, and which will be in effect equal to a reconveyance.

Promissory Notes,

Whether holograph or not, are now, by the bankrupt act in 1772, before taken notice of, entitled to all the privileges of bills. The form of one is,

Edinburgh, Aug. 5. 1782.

“ One day after date, I Peter Penny-
 “ less, writer in Edinburgh, promise to
 “ pay to William Writewell, or order, at

“ the

“ the Exchange Coffee-house here, the
“ sum of twenty pounds Sterling, for va-
“ lue.

Peter Pennylefs.”

If there are indorsers, these notes must be protested within the days of grace, to make them liable, as in bills; and, if there are none, they may be protested at any time within six months after the term of payment.

I shall conclude what relates to bills, with a few observations on the endurance of the privileges of the bills, and the method of raising diligence on them.

Bills, when they are drawn payable at a very distant term, lose the privilege of other bills. A bill payable one year after date, has been found entitled to all the ordinary privileges; but one at three years has been denied them.

Y

Though,

Though, after elapsing of six months after the term of payment, bills lose the privilege of summary diligence, yet they do not thereby lose their other privileges of not being affectable by compensation, arrestment, or the separate receipts of the original creditor, when standing in the person of an onerous indorsee, which continue for three years.

A warrant of arrestment will be granted on a bill, at the drawer's instance, or indorsees, after the six months.

No extrinsic stipulations ought to be contained in a bill which deviates from the proper nature of bills. Thus, a bill with a penalty, or clause of interest, from the date, is null, as deviating from their nature; but a bill bearing interest after the term of payment is valid; the law allowing it without such clause. There is no doubt, however, but the following bill
or

or draft would be sustained, though a little deviating from the ordinary form.

N—— S——t, June 12. 1782.

Gentlemen,

On demand, pay to Mr R. B. factor to the Right Honourable the Earl of G. in part of resting rent due by me to his Lordship, twelve pounds Sterling, and his receipt hereon shall oblige me to allow you the same at counting.

J—— G——.

*To P. M^cK—— and J. M^cN—— }
both in K. jointly & severally. }*

Bills must be protested where they are payable; if a place of payment be omitted, it must be done personally, or at the

acceptor's dwelling-place. The protest may be registered in the sheriff-court books of the shire where the acceptor resides, (or steward-court books of the stewartry, as Kirkcudbright), or in the commissary-court books of the commissariat, or the general register at Edinburgh; or, if the acceptor lives in a royal borough, in the borough-court books. If registered in the inferior court books, a precept is got out, whereon arrestment may be used, and poinding can proceed, after a premonition of six days is given, and the days expired. These precepts must be put in execution by the proper officers of these courts, but do not extend beyond the territory of the judge who gives them. Horning may likewise be raised on these precepts; but six days must run from the date of them, being the time in which a premonition might have been given and expired

expired before it can be applied for; and when it is applied for, it is by petition or bill to the Court of Session; the deliverance whereon is a warrant for the horning. The dues of registration in the inferior court books are $14\frac{1}{2}$ d.; and these bills are got five days in the week in time of session, and two days a week, Tuesday and Thursday, in time of vacation, for $\frac{1}{2}$ d. each to the servant or assistant of the clerk to the bills. In time of session, Monday is never a session day, so they are always extraordinary on that day, and cost 4d. or 6d. Saturday is the same as any other day in time of session; they are given in before nine forenoon, and might be got out after four in the afternoon, were it not that the signet is at twelve on Saturday. If they are got out to answer that day, they are charged extra at 4d.; but, if given in on Saturday, and got out

on Monday, they pay only common dues. If the protest is put into the general register, the extract thereof is a warrant for the horning without a bill, and the dues of registration 3 s. If the acceptor lives in a royal borough, it is unnecessary to raise horning and caption, as the precept of poinding in the registered protest is a sufficient warrant to poind; and if goods cannot be found poindable to the amount of the debt, an act of warding may be got, which answers the same purpose as a caption, the dues whereof are only 6 d. If arrestment is wanted without the borough, the Court of Session grants letters of arrestment upon bills, which are effectual all over Scotland; though a horning is a general warrant of arrestment over all Scotland, and of poinding after a charge given and expired, and also a step towards getting a caption. A charge of horning
being

being given, and the days of the charge elapsed, denunciation of the debtor, as rebel, is made by a messenger at the market cross of the shire where the debtor lives, and the horning and execution of charge and denunciation registered in the register of hornings, &c. for the shire; or he is denounced at the market cross of Edinburgh, and the horning, &c. registered in the general register. Upon either of which, upon application to the Lords of Session, by bill, as in the case of a horning, caption is got out. Inhibition may be obtained, either on an accepted bill, or registrar protest, by bill or application to the Lords, and even before the term of payment of a bill, if the debtor is declining in his circumstances. Inhibitions must be registrar in forty days after executing, in the books of the shire, or general register. Hornings, and other diligences,

gences, issued by the Court of Session, must be executed by their macers, or messengers at arms.

As to the endurance of bills, it is established by the act 1772, before mentioned, That no bill, or promissory note, granted after Whitsunday 1772, can be the foundation of any diligence or action, unless such diligence be raised, or action commenced, within six years from the date, when not accepted, and the term of payment when accepted. The act does not extend to bank notes or post bills then issued, or afterwards to be issued, by any banking company; and it is declared, that this prescription is not to run against minors; it being still competent to prove the debt resting owing by the debtor's oath, or other writings. It is contended by some lawyers, that it is necessary to give a premonition, or charge, as well as to

to protest and registrate, in order to save from the sexennial prescription: Though the act does not seem to require this, yet, to put the matter out of doubt, it is easy to cause a premonition be given within the six years. After diligence raised, they do not prescribe for forty years. The act 1772, so far as relates to bills and promissory notes, is made perpetual by an act in the 1783, *for rendering the payment of creditors more equal, &c.*

By an act of parliament in 1696, a bankrupt is described by the following characters; diligence against him by horning and caption; and insolvency, joined either with imprisonment, retiring to the sanctuary, flying, absconding, or forcibly defending himself from diligence; and that, from the time of his imprisonment, retiring, flying, absconding, or forcibly defending.

By

By the said act in 1783, it is enacted, That, when a debtor is made bankrupt in terms of the said act 1696, all arrestments which shall have been used for attaching any personal effects of such bankrupt, within 30 days prior to the bankruptcy, or within four kalendar months immediately subsequent, shall be, *pari passu*, preferable ; and, in order to save, as far as possible, the expence of a multiplicity of arrestments, it is declared, That, where the effects are arrested by any creditor within 30 days before the bankruptcy, or within four months after it, and a process of forthcoming * or multiple-pounding

* *Forthcoming* is an action brought by the arrester against the arrestee, and the debtor for his interest, for payment of the money, or delivery of the goods arrested.

pointing * is brought, in which such arrestment is founded on, it shall be competent for any other creditor producing his interest, and making his claim in the said process at any time before the expiration of the said four months, to be ranked in the same manner as if he had used the form of arrestment; the expences of raising the process, and of the diligence at the instance of the creditor who raises it, being always paid out of the common fund. *And it is also enacted*, that an arrestment executed at the market cross of Edinburgh, and pier and shore of Leith, in the hands of any person out of the kingdom, without other sufficient notification,

* *Multiplepointing* is an action brought by an arrestee, against more arresters than one, to have it determined who is preferable; and he is entitled to retain his expences off the fund in his hands.

cation, shall not interpel the arrestee from paying, *bona fide*, to the original creditor.

And, That no pointing of the moveables belonging to such bankrupt, within 30 days before his bankruptcy, as aforesaid, or within four kalendar months thereafter, shall give a preference to such poinder over the other lawful creditors of the bankrupt, but the goods so pointed shall be considered as *in medio*, and the person receiving the price of them shall be liable to make the same forthcoming, so as that all the other creditors of the bankrupt who are possessed of liquidate grounds of debt, or decrees for payment, shall be entitled to their proportion of the same; provided they make their claim, by summoning the poinder, at any time before the expiration of the said four months, deducting always the expence of

of such poinding from the first end of the price of such goods, together with 20 *per cent.* on the apprized value, which the poinder shall retain to account of his debt, in preference to the other creditors; reserving liberty to him to rank on the remaining sum for the full amount of the debt contained in his diligence.

By this statute, sequestrations can only be got for merchants, or traders in gross or by retail, bankers, brokers, underwriters, manufacturers, artificers, or mechanics, or persons dealing in the purchase or sale of goods or commodities, other than for their own use and consumption, and on the application of one creditor of L. 100, or two of L. 150, or on joint application by the debtor, and a creditor, or creditors, to the above amount; and cannot be obtained for landholders, tenants, or stockholders, unless falling un-

der the above descriptions of merchants, &c.

By this statute, likewise, in a ranking and sale of the bankrupt's estate and heritable subjects, the sale is ordained to precede the ranking of the creditors. But this part of the statute, and that which lays down the regulations to be observed in sequestrations, would swell this work too much to be inserted.

Stamp Duties on Bills.

By an act 22d Geo. III. it was enacted, That, after the 1st of August 1782, every piece of vellum, parchment, or paper, upon which any inland bill of exchange, promissory note, or other note payable, (otherwise than upon demand), should be written, where the sum did not

amount

amount to L. 50, should be charged with a stamp duty of 3d. ; and, where the sum should amount to L. 50, or upwards, a stamp duty of 6d. ; and, by an act passed in the 23d Geo. III. the duties imposed by the before mentioned act are declared to cease, and be no longer paid or payable; and it is enacted, That, from and after the 1st of August 1783, there shall be levied and paid for foreign or inland bills of exchange, promissory notes, or other notes, drafts, or orders, under L. 50, a stamp duty of 6 d. ; if L. 50, or upwards, 1 s. Excepting drafts and orders for payment of money on demand, upon bankers living within ten miles of the drawer's place of abode ; and bills of exchange, promissory, or other notes, drafts, or orders, payable on demand, issued in *Scotland*, for sums not exceeding 21 s. And it is thereby provided, that bills of

Z 2

exchange,

exchange, promissory notes, &c. under L. 10, payable on demand, are only to pay 3 d. And also, that no foreign bill of exchange, (i. e. drawn here, and payable in a foreign country); promissory note, &c. shall be charged with any higher stamp duty than 6 d.; but that every duplicate, or copy thereof, shall be chargeable with the like stamp duty of 6d. The duty on bills, promissory notes, &c. to be paid by the person who grants the same; and all vellum, paper, &c. to be stamped before any bill or promissory note shall be written thereon. And if any such bill of exchange, or promissory note, or other note, draft, or order, so directed to be stamped, shall not be marked or stamped, as by this act is directed, or shall be marked or stamped for a lower duty than as aforesaid, no such bill of exchange, promissory note, or
other

other note, draft, or order, shall be pleaded or given in evidence in any court, or admitted in any court to be available in law or equity.

Any person forging such stamps to be put to death.

By an act 24th Geo. III. it is enacted, That, from and after 25th March 1784, all persons who shall write or sign, or cause to be written or signed, any bill of exchange, promissory, or other note, given for payment of money, upon vellum, paper, or parchment, not duly stamped, shall forfeit the sum of L. 5, to be recovered before any neighbouring justice.

Drafts on bankers, on demand, not payable to the bearer, chargeable with duty, unless legally given for a sum under 40 s.

No bill or note to be stamped after being written or signed, unless upon payment of the duty, and L. 10.

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T I T. IX.

Bonds for Payment of Money.

ON account of the additional duties on stamped paper, simple personal bonds for borrowed money have been more seldom used than formerly, which has induced me hitherto to postpone giving the stile of one.

By an act in 1783, bonds, when under L. 100 Sterling, pay 4 s. of stamp duty; if exceeding L. 100, 5 s. additional; if amounting to L. 500, or upwards, 10 s. additional.

Simple

Simple Bond for a Sum of Money.

I A. B. of C. Esq; grant me, by these presents, to be justly addebted and owing to D. E. merchant in F. the sum of two hundred pounds Sterling, hereby renouncing all objections to the contrary; *which* sum of two hundred pounds Sterling I *bind* and *oblige* me, my heirs, executors, and successors whatsoever, to repay, and again deliver, to the said D. E. his heirs (a), executors, or assignees, betwixt the date hereof and the term of Whitsunday next to come, one thousand seven hundred and eighty-four years, with forty pounds Sterling of penalty and liquidate expences, in case of failzie, together also with the due and ordinary annualrent thereof, from and after the term of Martinmas last, till the foresaid term of payment, and there.

thereafter yearly, termly, and proportionally, during the not payment of the same; and I consent to the registration hereof in the books of Council and Session, or others competent, that letters of horning, on six days charge, and all other execution necessary, in form as effects, may pass hereon; and thereto constitute

my procurators, &c.

In witness whereof, these presents, written upon stamped paper by — — —, are subscribed by me, at — — —, the — — — day of January, one thousand seven hundred and eighty-four years, before these witnesses, — — — and — — —, both my servants.

Where the money is instantly received, you must say, “I, &c. grant me, by these presents, to have instantly borrowed and received, &c. whereof I acknowledge
“ the

“ the receipt, hereby renouncing,” &c.
 and at the clause for payment of interest,
 “ with the due and ordinary annual rent
 “ thereof from the date of these pre-
 “ sents,” &c.

A bond taken payable to “ heirs, exe-
 “ cutors,” &c. goes to the executor, as
 being properly the heir in moveables:
 But a bond may be made to descend to
 the heir, or, in law language, be render-
 ed heritable, by leaving out the word ex-
 cutors at letter (a), in the example gi-
 ven, and, in place thereof, saying, “ heirs
 “ and assignees, (secluding his execu-
 “ tors);” and, if arrears of interest at the
 creditor’s death be also to go to the heir,
 add, “ from the principal interest and pe-
 “ nalty,” before closing the parenthesis.

Bond by a tutor mentions whether he
 is nominate of law, or dative, and that
 the money was received by the tutor for
 the

the pupil's use, and binds the pupil to pay; but few persons would be fond of so slender a security, without having the tutor personally liable.

Bond by a minor, grants him, with advice and consent of his curator, to have received, &c. ; which sum, with consent foresaid, he obliges himself to pay, &c.

In a bond by a factor, the factor designs himself, "Factor for —, conform
"to factory and commission in his favour, dated, &c. registered, &c. where-
"by he is empowered to borrow money,
"and grant bond therefor, and obliges
"his constituent to pay."

Bond for the price of lands sold by voluntary roup, narrates the articles of roup; therefore, in implement thereof, the grant-er binds and obliges himself, &c.

Bond for the price of lands sold by judicial sale, is made out by the clerks of
court,

court, or their servants, as perquisites of office.

A person disposing an estate, to which the titles are not sufficiently clear and formal, may grant a bond to the purchaser, in order to adjudge the lands thereon. This bond may seclude the creditor or purchaser's executors; and, before the registration clause, contains this provision, or declaration of trust: " Provided
" always, as it is hereby provided and de-
" clared, that it shall not be lawful to the
" said C. D. or his forefairs, to use any
" personal diligence against us, our heirs,
" or executors, for payment of the said
" sum, nor affect, in virtue thereof, any
" estate, heritable or moveable, belong-
" ing, or that may belong to us; but that
" it shall be only lawful to him to affect
" the lands and estate of J. B. of L. decea-
" sed, or the estates of his brother, father,

" or

“or grandfather, proprietors of the said lands of L. viz. all and whole,” &c. (take in the lands particularly); or, the bond may be granted simply, as in the preceding example, and the purpose of granting mentioned in a back bond, though it is more safe in this manner, unless the back bond were registered; for latent back bonds will not hurt the rights of onerous assignees, or third parties transacting *bona fide*.

It may be observed of back bonds in general, that, in point of form, they contain a narrative of the transaction, or cause of granting, and then bind and oblige, in terms thereof, under a penalty. They may be used on so many occasions, and differ so much from one another, that examples to answer each would be endless.

Bond with a cautioner, goes on as in the example of a bond, to the words, “which sum,” and adds, “I the said A. B. as

A a

“principal,

“ principal, and G. H. in I. as cautioner,
“ surety and full debtor for and with me,
“ bind and oblige ourselves, conjunctly
“ and severally, to pay,” &c. “ and we
“ consent,” &c. instead of “ I consent.”
&c. and “ our procurators,” &c. in place
of “ my procurators,” &c. This bond
may, before the clause of registration, say,
“ and I the said A. B. bind and oblige me,
“ to free, relieve, harmless and skaithless
“ keep, the said G. H. of his said caution-
“ ry, and of all cost, skaith, damages and
“ expences, he may sustain therethrough
“ any manner of way.” This, where the
cautioner is mentioned as such, and not
as co-principal, is generally all the security
that is taken for his relief. The objection,
that the person having the right of relief
is not in possession of this right, vanishes,
when it is considered, that a right put in-
to the hands of a third person is consider-
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ed as delivered, and that no diligence can proceed on the bond till registration, which is equivalent to delivery, after which he may get an extract if he chuses. If he is obliged to pay, he is entitled to a discharge and assignation, to enable him to operate his relief.

Bond by co principals runs thus: "We A. B. in C. and C. D. in E. grant us, &c.; which sum we *bind* and *oblige* us, conjunctly and severally, our heirs, executors, and successors, to repay," &c.

Where the bond is granted by a principal and cautioner, as co-principals, a separate bond of relief is generally taken. It may be in these terms.

Bond of Relief.

Know all men by these presents, me A. B. in C. Whereas C. D. in E. &c. by our

A a 2

bond

bond, dated, &c. (narrate it), as the said bond more fully bears; and seeing the said C. D. became bound in manner above mentioned, at my desire, and that the foresaid principal sum of L. — was borrowed and received by me, and no part thereof applied to the use of the said C. D.; and it being just and reasonable that he should be relieved thereof, in manner under written; *therefore* I the said A. B. *bind* and *oblige* me, my heirs, executors, and successors, to free, relieve, harmless and skaithless keep, the said C. D. his heirs, executors, and successors of the bond above mentioned, whole sums of money therein contained, and of all cost, skaith, damages, and expences, he or his forefairs may happen to sustain or incur there-through any manner of way; and, for that effect, to make payment to the said —, (the creditor) against the said term of payment,

ment, of the said principal sum, interest to become due thereon, and liquidate expences that may be incurred; and to procure and deliver up to the said C. D. the said bond retired, that he may cancel his subscription thereto, or a sufficient discharge thereof; or otherwise, to make payment to the said C. D. of the said principal sum of —, interest due thereon, and liquidate penalty, if incurred, or at least so much thereof as the said C. D. may have happened to have laid out, against the said term of —, to the effect he may operate his own relief thereof, by paying the same to the said —, and obtain the said bond, retired or discharged, and that under the penalty of —, in case of failzie, by and attour performance. (Registration and subscription: clauses.)

Bond of relief may also have a cautioner for the relief.

Bond of relief, in consequence of a bond of caution for performance of a fact, or for faithful management of any affair, narrates the bond of caution: “ *And it being* “ just and reasonable that the said C. D. “ should be freed and relieved of his cautionry obligation in manner under written; therefore, wit ye me, the said A. B. as principal, and J. B. of E. as cautioner, with and for me, to be *bound* “ and *obliged*, as we hereby *bind* and *oblige* “ ourselves, conjunctly and severally, our “ heirs, executors, and successors, to free, “ relieve, harmless and skaithless keep the “ said A. B. his heirs and successors, of “ his said cautionry, and of all cost, skaith, “ damages and expences, he may sustain “ therethrough.” (Registration and subscription.)

By

By act 1695, c. 5. cautioners are not bound after seven years, if no diligence has been used against them in that time; and a co-principal, though so designed, if he intimate his bond of relief personally to the creditor at receiving the principal bond, is only bound seven years, if no diligence was done against him in that time.

Bond for a Sum of Money in the English form.

Know all men by these presents, that I A. B. of C. in the county of —, gentleman, am held and firmly bound to C. D. of E. in the county of —, Esq; in the sum of four hundred pounds of good and lawful money of Great Britain, to be paid to the said C. D. or his certain attorney, executors, administrators, or assigns; for which payment well and truly

to be made, I bind and oblige myself, my heirs, executors, and administrators, firmly by these presents, sealed with my seal. Dated the first day of August, in the twenty-fourth year of the reign of our sovereign Lord, George the third, by the grace of God, King of Great Britain, France, and Ireland, Defender of the Faith, and so forth, and in the year of our Lord one thousand seven hundred and eighty-four.

The condition of this obligation is such, that, if the above bounden A. B. his heirs, executors, or administrators, do well and truly pay, or cause to be paid, unto the above named C. D. his executors, administrators, or assigns, the sum of two hundred pounds of good and lawful money of Great Britain, on the ——— day of ——— next ensuing the date hereof, with lawful interest for the same, then this obligation

obligation to be void, or else to remain in full force.

Signed, sealed, and delivered,
(being first duly stamped) } A. B. L. S.
in presence of

G—— H——y.

J—— L——e.

It may be observed upon the bond in the Scotch form, where the penalty is a fifth part of the principal sum, that such part of it only as is laid out for raising and executing diligence, can be exacted; and on that in the English form, where the bond is granted for double the sum lent, conditional on payment of the half, or, real principal and interest, at a day certain, that, though it be not precisely paid, the creditor can only take the principal sum lent, interest, and expences. The only difference between the two is, the Scotch form points out a fifth part as a fund for recovering

recovering the expences in case of failure,
and the English a sum equal to the sum
lent.

Subscription Clause in the Isle of Man.

“ *In witness* whereof, they have hereun-
“ to set their hands and seals, *at* Douglas,
“ in the Isle of Man, (where no stamped
“ paper is used, or to be had), the day and
“ year first above written.

Signed, sealed, and deliver- } J. Q. L. S.
ed, in presence of } J. C. L. S.

“ J. T.

“ W. W.”

This was a mutual contract ; from
which it would appear their forms are
more similar to the English than ours.

T I T.

T I T. X.

Receipts and Discharges.

A *Receipt* is either an acknowledgment of a partial extinction of an obligation, or is granted where there was no prior obligation, as for goods, papers, money consigned, &c.; and, in the last of these cases, generally includes also an obligation implied or expressed. *A discharge* is a declaration of the total extinction of an obligation. Obligations may be extinguished or dissolved various ways, 1st, *By implement*, by which is meant payment, or performance of the obligation; in which

which case, if it is in writing, it is customary, where it has not been registered, simply to deliver up the obligation, which affords a strong presumption of the payment or performance; yet it is better to get a discharge written upon it at the same time, though not convenient to get a man of business, and though not perfectly formal; as, otherwise, if it fell into the creditor's hands, he might rear up a claim on it, on pretence of its not having been settled; and, on the other hand, it would take off every suspicion of being got hold of by the debtor without implement.

2dly, Obligations are extinguished by *consent*, that is, by the creditor's discharge, without implement, or without full implement of the obligation in his favour.

3dly, By *compensation*, which takes place when the same person is both creditor and debtor to another, whereby the mutual obligations,

obligations, if for equal sums, are extinguished; and, if for unequal, the lesser is extinguished, and the greater diminished. 4thly, *By novation*, or the change of one obligation into another, without changing the debtor or creditor; or, by the renewal of an obligation, the old one for the same thing is extinguished: Or, 5thly, *By confusion*, where the debit and credit meet in the same person, either by succession or singular title; as when the debtor succeeds to the creditor, or the creditor to the debtor, or a stranger to both.

As, in the receipt act 1783, there is an exemption of receipts given on the back of any bill or note, or indorsed on, or contained in the body of any deed, bond, mortgage, or other obligatory instrument directed to be stamped by any law in being prior to the receipt act, when they are in acknowledgment of implement, in

B b

whole

whole or in part, of an obligation, they may be very properly wrote on the back of it, which is not the least safe method, in case the obligation should be conveyed to a third person; particularly in bills, it is absolutely necessary.

Discharges for rent, and in mercantile affairs, do not require witnesses. N. B. Discharges for three terms rent presume all precedings paid.

A discharge for a term's annualrent, annuity, or jointure, was not formerly liable to stamp duty; and, if written on the back of the bond, as they commonly were, seems to fall under the exception in the receipt act. How far this would extend to receipts for rent on the back of the tenant's copy of the tack, is doubtful, as they were not wont to be so written. See abstract of the receipt act at the end of this title.

Discharge

*Discharge on the Back of a Bond for
Borrowed Money.*

I, B. C. within designed, grant me to have received from A. B. also within designed, full and complete payment of the within principal sum of one hundred pounds Sterling, and annualrents thereof resting unpaid, preceding the date hereof; *and therefore*, I hereby *discharge* the said A. B. his heirs and successors, of the said bond, principal sum, annualrents, and penalty therein contained, which discharge I oblige myself to warrant at all hands. *In witness* whereof, I have subscribed these presents, (written upon the back of the said bond by F. G. in H.), at —, the — day of —, one thousand seven hundred and eighty-four years, before

these witnesses, J. K. and L. M. both servants to the said A. B.

If the bond is registered, the discharge must be on a paper apart, and should also be registered. The practice formerly was, that, if the obligation was for a sum under L. 100 Scots, they did not use stamped paper (i. e. the 4 s. stamp, now 5 s.); but in that case they must pay upon the receipt act.

If the discharge is granted by an executor, he is designed as such, "conform
"to confirmed testament in his favours,
"dated," &c. And in case the person who is entitled to the office of executor has not confirmed the testament, nor has this bond specially assigned to him, nor contained in any list or inventory made with relation to any deed to take effect after the death of the creditor, it is necessary for the debtor's security to have the following

following clause inserted in the discharge:

“ And, in regard I have not yet confirmed
 “ the testament of the said deceased —,
 “ so as to entitle me to payment of the
 “ said sum, *therefore*, I hereby bind and
 “ oblige me, my heirs, executors, and
 “ successors, that I shall obtain myself
 “ confirmed executor to the said deceased.
 “ —, in so far as respects the said debt,
 “ with all convenient speed.” (Here I
 have seen the time specified, and a penalty
 inserted equal to the sum discharged. I
 apprehend the following alternative would
 be more proper than such penalty, and
 more consistent with the meaning of par-
 ties); “ *or otherways*, and in case any o-
 “ ther person shall obtain himself confirm-
 “ ed executor, and demand payment of
 “ the said sum from the said —, I bind
 “ and oblige myself, my heirs, and succes-
 “ sors, on intimation of such demand, to
 B. b 3. “ repay

“ repay to the said — the said sum of
 “ —, and that under the penalty of
 “ —, in case of failzie, attour per-
 “ formance. Registration,” &c.

The person granting such discharge may even give caution, for this purpose, if necessary.

Discharge of Annualrent.

If the bond is not registered, the annualrents may be discharged by a short receipt and discharge on the back.

Edinburgh, August 25. 1784. Received from A. B. within designed, the sum of — pounds Sterling, being one year's annualrent of the within bond, from — to —, which is hereby discharged. In witness whereof I have written and signed these presents, dated as above.

B. C.

If

If it is written by another person, " In
" witness whereof, I have signed these
" presents, written by —, date as above,
" before these witnesses, — and —,
" both in —."

I shall now give you a discharge of an-
nualrent on a paper apart, and by an as-
signee.

— by an *Assignee.*

I, D. hereby grant me to have received
from A. the sum of — pounds Sterling,
and that as a year's annualrent, from
Whitsunday — to Whitsunday last, of
the principal sum of — pounds Ster-
ling, contained in a bond granted by him
" to B. and assigned by him to me by as-
" signation," dated —; and therefore,
I hereby discharge the said A. of the said
year's

year's annualrent of the foresaid principal sum, and of all years and terms preceding the same, "since my said right and assign-
 "nation thereto." *In witness* whereof, I have signed these presents, written by, &c. at —, the — day of —, one thousand, &c. years, before these witnesses. And, if it is not by an assignee, you begin, "I, D. &c. contained in a bond
 "granted by him to me," &c.; and leave out all between the inverted commas.

In a discharge of a term's annuity, you begin as in a discharge of annualrent, and mention the sum, "as one year's (or half
 "year's) annuity from — to —,
 "one thousand, &c. years, contained in,
 "and due by, bond of annuity granted by
 "—, dated," &c.; "or by contract of
 "marriage entered into between the de-
 "ceased —, father to the said —, and
 "me, dated," &c. in case it be an annuity
 payable

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payable by a contract of marriage, such as conditioned for in one of the contracts mentioned under the title of Contracts of Marriage.

The wife's annuity, wherein she is provided and secured, in consequence of their contract of marriage, when the husband has land, is generally termed her Jointure. In a discharge of it, if such annuity is so called in the contract, you may put in the word *jointure* instead of annuity.

Discharges of Legacies.

By act 20th Geo. III. from and after the 1st June 1780, there is to be paid to his Majesty, “ for every skin or piece of
“ vellum or parchment, or sheet or piece
“ of paper, upon which any receipt, or o-
“ ther discharge, for any legacy left by any
“ will, or other testamentary instrument,
“ or

“ or for any share or part of a personal
“ estate divided by force of the statute of
“ distributions, or the custom of any pro-
“ vince or place, shall be engrossed, writ-
“ ten, or printed, the amount whereof
“ shall not exceed the value of twenty
“ pounds, a stamp duty of two shillings
“ and sixpence; and, where the amount
“ thereof shall be of the value of twenty
“ pounds, and not amounting to one
“ hundred pounds, a stamp duty of five
“ shillings; and where the amount there-
“ of shall be of the value of one hundred
“ pounds and upwards, a stamp duty of
“ twenty shillings;” and receipts written
upon paper not duly stamped, as above,
not to be available.

And by an act 23d Geo. III. “ where
“ the amount shall not exceed the value
“ of twenty pounds, there shall be charged
“ an additional stamp duty of two shillings

“ and

“and sixpence; and where the amount
“shall exceed the value of twenty pounds,
“and not amount to one hundred pounds,
“an additional stamp duty of five shillings;
“and where the amount thereof shall be
“of the value of one hundred pounds,
“an additional stamp duty of twenty shil-
“lings; and a like additional stamp duty
“for every further sum of one hundred
“pounds.” But this last mentioned act
provides, that the additional duties im-
posed by it shall not extend to legacies,
or shares of personal estates which shall be
left to the wife, children, or grandchildren,
of the person making such will or testa-
mentary instrument, or which shall be di-
vided among them by force of the statute
of distributions, or the custom of any pro-
vince or place.

Discharge

Discharge of a Legacy.

Know all men by these presents, me A. B. in C. ; *whereas* C. D. in E. now deceased, by testament dated —, legated and bequeathed to me the sum of — Sterling, the said sum to be paid at the first term of Whitsunday or Martinmas after his decease ; *and seeing* G. D. in E. executor of the said C. D. has made payment to me of the foresaid sum of — Sterling, whereof I grant the receipt, renouncing all objections on the contrary. *Therefore, wit ye me to have exonerated and discharged, as I by these presents exoner, quit-claim, and simpliciter discharge* the said G. D. his heirs, executors, and successors, of the foresaid sum of — Sterling, left in manner foresaid, and of all action and execution competent therefor for now and ever ;

ever; which discharge I oblige myself to warrant at all hands; *and consenting* to the registration hereof in the books of Council and Session, or others competent, therein to remain for preservation, *I constitute*

my

procurators, &c. *In witness* whereof, I have subscribed these presents, written upon stamped paper by, &c. at ———, the ——— day of ———, before these witnesses, ——— and ———.

*Discharge for a Sum left by General
Disposition and Settlement.*

Know all men by these presents, me A. B. in C. youngest son of the now deceased D. B. in E. in the parish of F. *Whereas* the said D. B. by general disposition and settlement executed by him, dated

C c

the

the — day of — last, *made, nominated,*
 and *appointed* G. B. in H. eldest lawful son
 procreate of the marriage betwixt him and
 the also deceased J. K. his spouse, his sole
 executor and universal intromitter, with
 his whole goods, debts, and effects, and
 others whatsoever, which should pertain
 and belong, or be owing and addebted to
 him at the time of his decease, any manner
 of way, with power to him to intromit
 with, uplift, and receive the whole goods,
 gear, debts, and others, generally and par-
 ticularly therein enumerated, *but* with and
 under the burdens, conditions, and provi-
 sions therein mentioned, *with* the express
 burden of the payment making to me of
 the sum of — pounds Sterling, within
 six months after his decease, with annual-
 rent thereafter, till payment (a); which
 sum of — pounds Sterling, so left me,
 he declared to be in full of all legitim,
 portion

portion natural, bairns part of gear, executry, or any thing else that I could ask, claim, or demand, in and through his decease, or by the decease of the said J. K. any manner of way (b). And seeing the said G. B. has made payment to me of the foresaid principal sum of ——— pounds Sterling, and annualrent resting due thereon: Therefore, wit ye me to have *exoner*ed, *quit-claim*ed, and *simpliciter discharged*, like-as I, by these presents, *exoner*, *quit-claim*, and *simpliciter discharge* the said G. B. his heirs, executors, and successors, of the foresaid principal sum of ——— pounds Sterling, and annualrents thereof since the same became due (c), and of all I can ask, claim, or demand, by the decease of the said D. B. my father, or of J. K. his spouse, both deceased, any manner of way (d), and of all action and execution

competent therefor. (Warrandice, &c. as before).

In case the discharge is by any other person than a son, it will be necessary to leave out from (a) to (b), and from (c) to (d).

*Discharge of Bairn's Part of Gear,
when there is no Settlement by the
Parent.*

I, L. M. in N. second lawful son of the deceased J. M. late in J. for a certain sum of money instantly advanced and paid to me by R. M. my eldest brother, do hereby *exoner, quit claim, and simpliciter discharge* the said R. M. his heirs and successors, and all others the heirs, successors, and representatives of the said J. M. my father, of all executry, legitim, portion natural, bairns part of gear, and every other

other thing whatsoever that I might ask, claim, or demand, in or by the decease of the said J. M. my father, or of E. F. his spouse, my mother, any manner of way, which discharge I oblige myself to warrant, &c. (as in discharge of a legacy).

*Discharge of a Bond of Provision and
Bairn's Part of Gear.*

Know all men by these presents, me A. B. in C. *Whereas* G. B. in E. my father, by bond of provision dated —, bound and obliged him, his heirs and successors, to make payment to me, or my heirs and assignees, of the sum of — pounds Sterling, and that at the first term of Whitsunday or Martinmas after his death, with — of penalty, and interest during the not payment, as the said bond bears; and

seeing C. B. in E. my eldest brother, as heir to the said G. B. has made payment to me of the said sum of ———, and annualrents due and resting thereon, whereof I grant the receipt, renouncing all objections to the contrary. *Therefore*, wit ye me to have *exonerated* and *discharged*, as I hereby *exoner*, *quit-claim*, and *simpliciter discharge*, the said C. B. his heirs, executors, and successors, not only of the foresaid sum of ———, and whole annualrents resting thereon, and penalty before mentioned, and of all action therefor, but also of all executry, legitim, &c. (as before).

*Discharge of Tutors and Curators
Accounts.*

Be it known to all men by these presents, me A. B. in C. *Whereas* D. E. in F. and
G.

G. H. in I. tutors and curators nominated and appointed to me by C. B. in E. my deceased father, by deed of nomination dated —, (and if in the end of a general disposition, you may say, “by nomination contained in general disposition “executed by him, dated —”), have most faithfully discharged their trust as tutors and curators to me in my education, and the management of my estate during the years of my pupillarity and minority, and employed the same to the best advantage, and have made due and faithful account of all their intromissions, and have delivered to me all bonds, obligations, and other vouchers of debt conceived in my favours thereanent. *Therefore wit* ye me the said A. B. now after my majority, and full and perfect age of twenty-one years, *not only* to have granted receipt of the said bonds, and other vouchers of debt,

debt, renouncing all objections to the contrary, *but also*, to have *exonerated* and *discharged*, as I by these presents *exoner*, *quitclaim*, and *simpliciter discharge* the saids D. E. and G. H. their heirs and successors, of all and sundry goods, gear, debts, sums of money, rents, maills and duties of lands, annualrents, and others pertaining to me, and intromitted with by them as tutors and curators foresaid, during my pupillarity and minority, and of all omissions thereanent, and of all action and execution competent to me against them thereupon, *dispensing* with the generality hereof, and declaring the same to be as good, valid, and sufficient, as if every particular of their intromissions and management were herein at length insert; whereanent I have dispensed, and hereby dispense for ever; and I oblige myself, my heirs and successors, to warrant this discharge for their
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exoneration, at all hands, and against all
deadly, as law will, and *consenting* to the
registration hereof in the books of Council
and Session, or others competent, therein
to remain for preservation, and, if need-
ful, that all execution necessary in form,
as effeirs, pass hereon; I thereto consti-
tute

my procurators, &c. In witness
whereof I have subscribed these presents,
(written upon this and the ——— preceding
pages of stamped paper, by ———,) at —,
the ——— day of ———.

As the same persons are most frequent-
ly both tutors and curators, I have given
an example of a discharge in that case,
from which it would be very easy to make
out one to persons who had been either
tutors or curators, without being both.
I shall however, give an example of each,
in

in so far as they are different from the above.

*Discharge to a Tutor with consent of
Curators.*

Be it known, &c. me A. B. in C. with advice and consent of L. M. in N. and O. P. in Q. my curators : *Whereas* D. E. in F. being appointed tutor-dative, by gift thereof from the Barons of Exchequer in his favour, dated, &c. or tutor of law, served, &c. ; *and seeing* I have attained to the age of fourteen years complete, and the said office of tutory being expired, have made choice of the saids L. M. and O. P. to be my curators ; and the said D. E. having most faithfully discharged his trust as tutor to me in my education, and the management of my estate, during the years of my pupillarity, and employed,
&c.

&c.; and has made due and faithful account, &c.; and has delivered to me, and my said tutors and curators, all bonds, &c. *Therefore, wit ye me* the said A. B. with the advice and consent of the saids L. M. and O. P. my curators, *not only, &c. but also, &c.* the said D. E. his heirs, &c. as tutor foresaid, during my pupillarity, and of all action, &c. dispensing, &c. (and so on to the end).

Discharge to Curators.

Be, &c. me A. B. in C. *Whereas* D. E. in F. and G, H. in J. curators nominated and chosen by me before the Commissaries of ———, upon the ——— day of ———, one thousand seven hundred and seventy ——— years, have faithfully discharged their trust as curators to me during the years of my minority, in my education,

tion, &c. to the best advantage, and have made due and faithful account, &c. and have delivered to me all bonds, &c. *Therefore, &c. not only, &c. but also, &c.* the saids D. E. and G. H. and all cautioners found by them the time of their election, of all and sundry goods, &c. and of all action, &c. dispensing, &c.

Discharge of Indentures.

I, A. B. within designed, *do* hereby testify and declare, that the within designed C. D. did become bound and entered apprentice and servant to me in my trade and employment of —, upon the within — day of —, and has, for the whole space and time of —, faithfully and honestly served me as became an apprentice and servant to do, without absenting himself, and fulfilled the within indentures in

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the whole clauses thereof. *Therefore* I, by these presents, *exoner, quit claim, and simpliciter discharge*, the said C. D. and G. H. his cautioner, their heirs and successors, of the same, whole heads, clauses, and obligations therein contained, whole force and effect thereof, and of all that I can anywise ask of them, for whatever cause or occasion, preceding this date, with all action and execution competent thereupon; which discharge I oblige me to warrant at all hands. *In witness* whereof, &c.

Discharge of a Lost Bill.

Be it known to all men by these presents, me A. B. in C. *Whereas*, by bill dated —, drawn by me upon, and accepted by D. E. in F. I ordered him, — days after date, to have paid to me, or order, — pounds Sterling, as the said principal

D d

cipal bill now lost or mislaid bears; and now, seeing the said D. E. has, notwithstanding of the said bills being lost, as said is, made payment to me of the foresaid principal sum, and whole bygone annualrents thereof; and it being just and reasonable I should grant the discharge and obligation under-written; therefore, wit ye me, the said A. B. not only to have exonered and discharged, as I, by these presents, exoner, quit-claim, and simpliciter discharge the said D. E. his heirs and successors, of the said principal sum of ——— pounds Sterling, and whole bygone annualrents contained in the bill above mentioned (a), and of the said principal bill itself, with all that has followed, or may follow thereon, for ever, but also, to be bound and obliged, as I, the said A. B. as principal, and G. H. in J. as cautioner with and for me, bind and oblige us, conjunctly and severally, our heirs,

heirs, executors, and successors, that, in case the foresaid principal bill shall, at any time hereafter, appear indorsed, or otherwise conveyed in favours of any other person or persons, so as the said D. E. may be subjected in payment of the contents thereof, or any part of the same, then, and in that case, to repeat and pay back the same to the said D. E. and his foresaids, and to free and relieve him of the effects of the foresaid lost bill, and of all cost, skaith, damage, and expences, he, or his foresaids, may incur therethrough, in any sort, and that under the penalty of ——— pounds Sterling, by and attour performance; *and consenting* to the registration hereof in the books of Council and Session, or others competent, that letters of horning, on six days charge, and all other execution necessary, in form as effeirs, pass hereon, we constitute

our procurators. In witness
whereof, &c.

For a lost bond, it is only to narrate the
bond instead of the bill, and at (a) to in-
sert, "and penalty above mentioned obli-
ged therefor;" and instead of, "*appear*
"*indorsed*," say, "*appear assigned*."

Abstract of the Receipt Act.

From and after the 1st September 1783,
receipts, or other discharges, given upon
the payment of money, amounting to L. 2,
and under L. 20, to pay 2 d. each; for
L. 20, and upwards, 4 d. each; receipts
in full also to pay 4 d. each.

This act, it will occur, cannot extend
to receipts for papers, goods, cattle, or
any thing, except money.

This act is declared not to extend to charge
any receipt for money paid into the Bank
of

of England, or the house of any banker, or for any dividend of the public or government funds established by parliament; or any receipt given on the back of any bill of exchange, promissory or other note duly stamped, or upon any bank note or bank post bill; or to any letter acknowledging the safe arrival of any bills, notes, or remittances; or any receipt indorsed on, or contained in the body of any deed, bond, mortgage, or other obligatory instrument, already directed to be stamped by any law now in being; or to any release or acquittance by deed; or to receipts given by the treasurer of the army, agents for the army, officers, seamen, soldiers, or their representatives, for wages, pay, or pension.

Also, not to extend to any receipt on the back of a foreign bill of exchange.

Persons fraudulently evading the duties, by inserting a less sum than that actually received, or by separating or dividing a sum into divers receipts, or using any other fraudulent device to avoid the duties, to forfeit L. 20. Receipts in full of all demands to pay 4 d.

Duty on receipts to be paid by the person requiring them, except receipts for salaries, pensions, &c. payable from his Majesty, which are to be paid by the person giving them.

Receipts to be stamped before written; and if not stamped as directed by this act, or stamped for a lower duty, they shall not be pleaded or given in evidence in any court, or available in law or equity.

Unstamped receipts, in which a sum under L. 2 shall be expressed, and which shall (by the insertion of the words *in full* of

of all demands, or otherwise) be given as a general acknowledgment of all debts or demands being discharged, may be pleaded, or given in evidence for the sum expressed, but not as an acknowledgment of all debts and demands being discharged; and, in like manner, 2 d. stamped receipts for L. 2, and under L. 20, may be given in evidence for the sum expressed therein, though these words be insert, but not as a general discharge of all demands.

And, by amendment of the said act— from and after 25th March 1784, persons writing or signing receipts or discharges upon paper not duly stamped, shall forfeit L. 5, to be recovered before any neighbouring justice.

Persons required to give receipts, are empowered to charge the value of the stamp to the person requiring the receipt.

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No receipt or discharge to be stamped after being written or signed, unless upon payment of the duty of L. 10.

Persons counterfeiting the stamp to suffer death.

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T I T. XI.

Of Contracts of Feu, Conveyances thereof, and Charters thereon.

A Contract of feu is a kind of perpetual location, and differs from a tack or lease in this, that a tack is only for a term of years, the other to perpetuity; for a tack is also an heritable right. The words *set* and *let* are commonly used in both. In a lease of lands, the lessee's right is limited to those yearly fruits, which either naturally, or by culture, spring from the surface. He is not entitled to wood or growing timber above ground,
nor

nor to coal, lime, &c. beneath it, which consume the substance, unless there is a special clause in the tack to that purpose. A feuer is entitled to the whole profits arising from his feu; to the woods, &c. above ground; and to the coal, limestone, &c. under it; and can give real security thereon for debt. As it is a perpetual right, infeftment is necessary to complete it, and registration of the seifine, or instrument taken thereupon within 60 days after infeftment, that purchasers may have an opportunity of seeing such perpetual incumbrances upon lands, by searching the records, otherwise it is not good against them, but only against the granter and his heirs. There is no time, however, limited for taking infeftment; but if a proprietor gives a right, and, before infeftment is taken on it, gives another person right to the same subject, the first infeftment,

ment, though on the second right, is preferable, if the person receiving the second right was not in the knowledge of the first being granted before he received his. The persons guilty of granting such double conveyances (a crime termed *Stellionate*) are highly punishable, being declared infamous by our statutes, and to be punished in their persons and goods at the King's pleasure; and besides, the person who got the first right has recourse against the granter and his heirs. If a person acquired right, by purchase, to the whole estate out of which the feu is granted, and the feu was omitted to be excepted in making out the rights, and the purchaser infest before the feuer, he would have the best right, if not in the knowledge of the feu at purchasing; and, in this particular case, the evidence of a fraudulent intention is not so very clear, that it would subject the

the

the seller to such severe punishment;—in all probability, the feuer would, however, have recourse upon him. To prevent this ground of dispute betwixt a feuer and purchaser, in the disposition to the latter, and in every case where it is only the superiority that is to be conveyed, as it is in this case, in so far as relates to the feu, there is, or ought to be, an exception of feu contracts, or rights of property of the lands granted by the disponent expressly reserved from the warrandice, but with power to the purchaser to quarrel and reduce them on any ground in law not inferring warrandice, or recourse against the disponent. Where the original granter becomes bankrupt, recourse is lost; and, where there are creditors to deal with, the subject is in danger of being totally carried off, if infestment is not taken, as there is no real right before infestment, but a
right

right barely personal against the granter and his heirs. If any person purchase the right before infeftment, the feuer may assign to the purchaser the unexecute precept of seifine, upon which the person receiving the assignation may be infeft. The heir, by a general service, acquires right to the unexecuted precept, and may be infeft by 1693, c. 35. Such precept is good, though the granter of the right containing it, and the receiver, should both die before it is executed, contrary to the general nature of mandates. Precepts of *clare constat*, to be after taken notice of, are an exception, and must be followed by infeftment in the lifetime of the persons receiving them.

Besides the casualties of superiority proper to other holdings, there is a particular casualty or forfeiture proper to feu holding, unless expressly provided

E e

against

against in the feu right, which is the loss of right to the feu by neglect of payment of the feu duty for two whole years, by act of parliament in the 1597, commonly called the *tinsel of the feu right ob non solutum canonem*, and the irritancy made by the act of parliament is generally inserted in the feu contract; where there is no conventional irritancy, the vassal is allowed to purge (or take away by payment) the legal at the bar before sentence; but, where the legal irritancy is fortified by a conventional one, it is thought he cannot be allowed to purge it without very good reasons.

With regard to the casualties due in feu-holdings, proper to holdings in general,

Non-entry is a casualty which falls to the superior out of the rents of the feudal subject, through the heir's neglecting to

get

get the investiture renewed after the death of the ancestor. It is the retoured duty till citation upon a summons of general declarator of non-entry, and the full rent afterwards, unless a reasonable cause can be assigned; but, as the feu-duty is really the retoured duty in feu-holdings, there is no non-entry due by that holding till citation on a declarator of non-entry. It is excluded by infestment of property confirmed by the superior, during the lifetime of the person so infest; by terce and courtesy; reserved liferent; by the vassal's not entering being occasioned by the fault of the superior; by the heir of the superior, after his death, not being entered. Seisine to three consecutive heirs presumes all proceedings paid. A *novodamus* (i. e. a clause in a charter, whereby the superior grants, *of new*, the subjects, to supply all defects in the rights, so called from *de novo damus*,

&c.) has the same effect. A charter, or precept of *clare constat*, granted voluntarily, without a clause of *novodamus*, imports a discharge of non-entry duties incurred preceding the death of the predecessor.

Relief is that casualty which entitles the superior to an acknowledgment or consideration from the heir of the deceased vassal, for receiving him as vassal in the lands. It is so called, because, by the entry of the heir, the feu is relieved out of the superior's hands. It is a sum equal to one year's feu-duty, though it is generally mentioned as the double of the feu-duty for the first year; one half of that sum is the feu-duty properly payable for that year, the other half relief. As it has been doubted whether it is due in feus held of subjects, without a special provision for doubling the feu-duty the first year of the entry of every heir, a clause to this purpose is generally

merally inserted, and it is frequently stipulated what is to be paid for the entry of a singular successor, (*i. e.* one acquiring right otherwise than by descent) as, without such stipulation, the superior would be entitled to a year's rent from the singular successor, whether of lands or houses, as the same are set, or may be set at the time, deducing the feu-duty, public burdens, and all annual burdens imposed with consent of the superior, with a reasonable allowance for reparation of houses. It was thus ascertained by decision, February 14. 1775, *Aitchison contra Hopkins*.

Liferent escheat is only due in criminal cases, and by it the superior is entitled to the profits of the subjects held of himself during the criminal's life.

Disclamation and *purpresture* are rather total forfeitures of the right, than casualties; the first is incurred by disowning or

disclaiming the superior before a judge;
the other, by encroaching on his property
by building, inclosing, &c.; and the last
seems to be almost in disuse.

Contract of Feu.

It is contracted, agreed, and ended, be-
tween the parties following, viz. A. B.
Esq; of C. heritable proprietor of the
ground after mentioned, with the perti-
nents, on the one part, and D. E. mer-
chant in F. on the other part, in manner
underwritten: That is to say, the said A.
B. for the payment of the yearly feu-duty,
and performance of the other prestations
after specified, with and under the condi-
tions and provisions after expressed; here-
by lets, and in feu-farm and heritage per-
petually lets and dispones from him; his heirs

and

and successors, to and in favour of the said D. E. his heirs and assignees whatsoever, heritably and irredeemably, *all and whole* that piece of ground on the east side of the town or village of F. upon which the said D. E. hath, in consequence of missives betwixt the said A. B. Esq; and him, built a house, consisting of — feet in length in front, ranging with the houses on the same side of the street, and of — feet in breadth, with a yard at the back of the said house, consisting of — feet in length backwards therefrom to the water of C. and of breadth equal to the length of the said house, bounded by the house and yard lately feued to G. H. on the south, by the high street of the said town or village on the west, and by the house and yard lately feued to J. T. on the north, and by the water of C. on the east parts, with the whole parts, pendicles, and pertinent
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nents thereof, all lying within the parish of ———, and sherriffdom of ———, together with all right, title, interest, claim of right, property, and possession, petitory and possessory, which the said A. B. his authors and predecessors had, have, or anywise may have, claim, or pretend thereto in time coming; declaring his entry thereto to have been and begun at the term of Whitsunday last, thenceforth to be peaceably possessed and enjoyed by the said D. E. and his foresaids, in feu farm, fee, and heritage for ever; with full power to the said D. E. and his foresaids, to use all manner of free trade and traffick within the said town or village, as freely as any other trader within the same are in use to do; in which house and yard before written, with the pertinents, the said A. B. binds and obliges himself, and his foresaids, duly, validly, and sufficiently, to infest and

seise

seise the said D. E. and his foresaids, upon their own proper charges and expences; and, for that effect, to grant, subscribe, and deliver charters, containing precepts of seisine, and all other clauses necessary to be holden by the said D. E. and his foresaids, of the said A. B. his heirs, and successors, immediate lawful superiors thereof, in feu farm and heritage, as said is, for the yearly payment of the feu-duty underwritten, and performing the several obligations, prestations, and conditions after mentioned, and which are specially to be contained in the infeftments to follow hereupon; and the said A. B. binds and obliges himself not to lie out unentered, in time coming, to the superiority of the said house and yard, with the pertinents, and to enter and receive the heirs of the said D. E. and his foresaids, as vassals therein, from time to time, as they shall

shall be required to that effect, on the terms and conditions after expressed, and doubling the feu duty in manner underwritten, and also to enter and receive the singular successors therein, in the same manner, for payment of the double of the feu duty the first year of the entry of each singular successor thereto, to which sum such entry is hereby declared to be taxed, so often as the same shall happen, without any further composition whatever; which house and yard, with the pertinents, disposition thereof before written, and indentments to follow thereupon, the said A. B. binds and obliges himself, and his forefairs, to warrant to the said D. E. and his forefairs, with and under the express obligations, conditions, and prestations after written, at all hands, and against all deadly, as law will. *For the which causes* the said A. F. binds and obliges him, his

heirs

heirs and successors whatsoever, to make good and thankful payment to the said A. B. Esq; and his forefaids, superiors of the said house and yard, of the sum of ——— Sterling money yearly, at the term of Martinmas, in name of feu-duty; declaring the first term's payment of the same to commence and begin at Martinmas next for the first half year's feu duty then due, and so forth yearly at Martinmas in all time thereafter, with two Fasten-even hens yearly at the usual terms of payment, and doubling the feu-duty the first year of the entry of every heir or heirs thereto, as use is, of feu-farm, allenary; and also doubling the feu-duty the first year of the entry of each singular successor, as above mentioned: As also, the said D. E. binds and obliges himself, and his forefaids, to compare and answer to all the courts to be holden therein, by the superior or his bailies,

bailies, when lawfully cited thereto, and obey the statutes thereof under the pain of —, as an unlaw or amerciament for each failzie; and farther, by these presents, binds and astricts himself to the corn mill of the barony of C. commonly called the Mill of C. and thereat to grind all their corn and malt, and to pay the multures used and wont, as the other inhabitants of the said town or village are in use to pay, and that they shall be liable in the like services as any other feuer within the same are, and shall be in use to perform; and binds and obliges himself, and his forefairs, to free and relieve the said A. B. and his forefairs, of all public burdens, impositions, and other taxations that are or shall happen to be imposed upon the said house and yard, with the pertinents before disposed, in time coming, after the said term of Whitsunday, and that as the other

other inhabitants and feuers are, or shall be in use to do, the said A. B. freeing and relieving the said D. E. of all public burdens, and others, payable for the same, preceding that term, with and under which conditions, obligations, and prestations, to be performed by the said D. E. and his forefairs, these presents are made and granted, and no otherwise; and *consenting* to the registration hereof in the books of Council and Session, or others competent, that letters of horning, on six days charge, and all other execution necessary, in form as effects, pass thereon, they constitute

their procurators.

Attour, to the effect the said D. E. may be more readily infest and seised in the fore-said house and yard, with the pertinents, the said A. B. by these presents, *makes, constitutes, and ordains*

F f

and

and each of you, conjunctly and severally, his bailies in that part, specially constitute, commanding you, upon sight hereof, to pass to the ground of the foresaid house and yard, or any part thereof, and there give and deliver heritable state and seifine, actual, real, and corporeal possession of the foresaid house and yard, with the pertinents, lying as said is, to the said D. E. by deliverance of earth and stone, of the ground of the same, to him, or his certain attorney, bearer hereof, to be holden of the said A. B. and his foresaids, immediate lawful superiors thereof, in feu-farm and heritage, as said is, for the yearly payment of the feu-duty, and performance of the several obligements, prestations, and conditions before written, and which are specially to be contained in the infestments to follow hereupon, and this in nowise ye

leave

leave undone. The which to do, the said A. B. commits to you, and each of you, full power, by this his precept. In witness whereof, these presents (consisting of this and the ——— preceding pages of stamped paper), written by ———, are subscribed by the said parties, as follows, viz.

Disposition and Assignment to a Contract of Feu before infeftment.

I, D. E. in F. for a certain sum of money advanced and paid to me by G. H. in J. as the agreed worth and price of the house and yard after mentioned, whereof I grant the receipt, renouncing all objections to the contrary, *do* hereby, with and under the burden of payment of the yearly feu-duty and performance of the other obligations and prestations contained in

the contract of feu after mentioned, *assign*,
convey, and *make over* from me, my heirs
 and successors, *to and* in favours of the
 said G. H. his heirs and assignees whatso-
 ever, heritably and irredeemably, *all* and
whole (here insert the description and
 boundings of the subject) together with
 all right, title, interest, claim of right,
 property, and possession, petitory or pos-
 sessory, which I or my authors had, have,
 or may have, claim, or pretend thereto;
 and I hereby make and constitute the said
 G. H. and his forefairs, my lawful cession-
 ers and assignees, *not only in* and *to* the writs,
 evidents, and title deeds of the same; and
 particularly, a contract of feu of the said
 subjects, entered into between A. B. Esq;
 of C. superior of the said subject, and me,
 dated the day of one
 thousand, &c. years, with power to the
 said G. H. to obtain himself invest in the
 said

saïd house and yard, in virtue of the pre-
cept of seifine contained in the saïd feu-
contract hitherto unexecute; but also, in
and to the maills and duties of the saïd
subject, from and after (a) the term of
Whitsunday last, in time coming. Sur-
rogating and substituting the saïd G. H.
and his foresaïds, in my full right, title,
and place of the premisses, with power to
do every thing thereanent that I could
have done myself before granting hereof.
Which disposition I bind and oblige me
to warrant from my own facts and deeds
allenary, done, or to be done, in preju-
dice hereof, and to free and relieve the
saïd subjects of all feu duties, and others,
payable out of the same, at and preceding
the term of Whitsunday last, the saïd G.
H. and his foresaïds, being always bound
and obliged to free and relieve me of the
saïd feu-duty, and other prestations in-

cumbent by the said contract, in all time coming; and I have herewith delivered up to the said G. H. my double of the said contract of feu, to be kept and used by him, and his foresaids, as their own proper evident in time coming. Consenting to the registration hereof in the books of Council, and Session, or others competent, therein to remain for preservation, and, if needful, that all execution necessary, in form as effects, pass hereon; and thereto I constitute

my procurators.

In witness whereof, &c.

It has been said before, that the heir by a general service acquires right to the unexecute precept of seifine; but, to save this trouble and expence, it is very ordinary for a man to assign to his son the feu contract, with power to obtain himself infest on the unexecute precept; and this will

will differ from the preceding in little more than the narrative.

I, D. E. in F. for the love, favour, and affection which I have and bear to G. H. my eldest lawful son, procreate of the marriage betwixt me and ———, and for other weighty causes and considerations me hereto moving, do hereby, with and under the burden, &c. (as above) give, grant, dispoſe, assign, and make over to and in favours, &c. (to letter (a),) from and after my deceaſe, whenever the ſame ſhall happen; *reſerving always* to me my life-rent right and uſe of the ſubjects above diſpoſed, during all the days of my life-time, and full power, faculty, and liberty to alter, innovate, or annul theſe preſents, in whole or in part, at any time in my life; ſurrogating, &c. with power to him immediately after, upon my deceaſe, to do
every

every thing thereanent I could have done myself while in life; dispensing with the not delivery hereof; and admitting and declaring these presents, if found lying by me, or in the hands of any third person, at the time of my death, to be as valid and effectual as if delivered by me while in life; with the not delivery whereof I have dispensed for ever. *Consenting* to the registration, &c.

If the superior is willing to receive the heir of the person last infeft in a feu tenement as vassal, he grants him a precept of seifine, called a precept of *clare constat*, without putting him to the trouble or expence of serving heir in special to his predecessor in the subject, which, if the superior refuse, he must do, and the heir, upon production of his special retour, may obtain horning against the superior to charge

charge him to receive him as vassal in fifteen days, the vassal paying to the superior the casualities he has right to out of the subjects.

Precept of Clare Constat.

A. B. Esq; of C. superior of the house and yard after mentioned, with the pertinents: *Know ye me, whereas*, by authentic instruments and documents produced to me, and by me read, seen, and considered, *it clearly appears* and is made known, that the now deceased D. E. merchant in F. father of *my lovit*, G. E. merchant there, bearer hereof, died last vest and seised as of fee, at the faith and peace of our sovereign Lord the King, in *all* and *whole*, &c. (here take in the subjects) lying within the parish of — and sherriffdom of —, and that the said G. E. bearer hereof, is
the

the eldest lawful son of the said deceased D. E. and so my said lovit is nearest and lawful heir to the said D. E. his father, and that he is of lawful age, and that the said house and yard are held of me, my heirs and successors, as superiors thereof, for payment to me, my heirs and successors, of the sum of — money yearly, at the term of Martinmas, in name of feu-duty, with two Fasten-even hens yearly, at the usual terms of payment, and doubling the feu-duty the first year of the entry of every heir or heirs thereto, as use is, of feu-farm, allenary; and also doubling the feu-duty the first year of the entry of every singular successor therein, to which sum such entry is hereby declared to be taxed, without any further composition, and compearing and answering at all the courts to be holden therein, by me or my foresaids, superiors, or our bailies,

lies, when lawfully cited thereto, under the pain of ———, as an unlaw or amerciament, for each failzie; and the said G. E. and his foresaids, being bound and astricted to the corn mill of the barony of C. commonly called the Mill of C. and thereat to grind all their corn and malt, and paying the multures used and wont, as the other inhabitants of the said town or village are in use to pay, and being liable in the like services as any other feuer within the same are in use to perform; and in like manner, freeing and relieving me, the said A. B. and my foresaids, of all public burdens, impositions, or other taxations that are, or shall happen to be imposed on the said house and yard, with the pertinents, in time coming, and being liable effeiring and conform to their part and portion of the customs and other exactions that may be due and payable by the

the said town or village, as the other inhabitants thereof are and shall be in use to do; and which prestations and obligations are specially to be contained in the infeftment to follow hereupon. *Therefore,* to

and each of you, my bailies in that part, conjunctly and severally, specially constitute, to the effect after mentioned: It is my will, and I hereby desire and require you, that, on sight hereof, ye pass to the ground of the foresaid house and yard, and there give and deliver heritable state and seifine, actual, real, and corporeal possession of *all* and *whole* the foresaid house and yard, with the pertinents, lying as said is, by deliverance of earth and stone, of the ground of the same, to the said G. E. as heir foresaid, or his certain attorney, in his name, bearer hereof, to be holden as said is; and
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this in nowise ye leave undone; the which to do, I commit to you, and each of you, my bailies in that part foresaid, my full power, by this my precept of seifine. In witness whereof, these presents (written upon this and the preceding page of * stamped parchment, by L. M. in O. my factor) are subscribed by me, and my proper seal ordered to be appended, at C—, the — day of —, — years, before these witnesses, Q. R. and J. T. both my servants.

If any of the persons before mentioned get themselves infest, and afterwards dispose these subjects, the disposition will run in the following form :

G g

Dis-

* If written on the face of a sheet, or on one page, leave out the words, 'this and the preceding page of.'

*Disposition of a House and Yard held
in Feu.*

I, A. B. * — in C. heritable proprietor of the house and yard after mentioned, for a certain sum of money instantly advanced and paid to me by C. D. — in E. as the agreed worth and price thereof, the receipt whereof I hereby acknowledge, renouncing all objections to the contrary, *do* hereby, with and under the burden of payment of the yearly feu-duty, and performance of the other obligations and prestations underwritten, *sell, alienate, and dispose* from me, my heirs and successors, *to* and *in* favours of the said C. D. his heirs and assignees whatsoever, heritably and irredeemably, *all* and *whole* (here take in

* A. B. is here used for the person vested in the feu, not the superior, as in the preceding examples.

in the description of the subjects from the former rights or infestment), lying within the parish of —, and sherriffom of —, together with all right, title, interest, claim of right, property, and possession, petitory or possessory, which I, my authors and predecessors, heirs and successors, had, have, or may have, claim, or pretend thereto. In which house and yard, with the pertinents, I bind and oblige me, and my forefairs, to obtain the said C. D. and his forefairs, duly, validly, and sufficiently infest and seised, upon their own proper charges and expences, to be holden in manner after mentioned, by two several infestments and manners of holding; the one thereof to be holden of me, my heirs and successors, in free blench, for payment of a penny Scots money upon the ground of the same house and yard, at the term of — yearly, if asked allenarly; and the other of

the said infeftments to be holden from me, and my forefaids, of our immediate lawful superiors thereof, in the same manner, and as freely, as we held, hold, or might hold the same ourselves; and that either by resignation or confirmation, or both, the one without prejudice of the other, and for expeding the said infeftment by resignation, I hereby make and constitute ——— and each of them, conjunctly and severally, my lawful procurators, for me, and in my name, to *resign*, as I hereby *resign*, *give up*, and *surrender*, from me, and my forefaids, *all* and *whole* the foresaid house and yard, with the pertinents, lying and bounded, as said is, with all right, title, or interest I have, or can pretend thereto, in the hands of ———, his heirs and successors, my immediate lawful superiors of the said house and yard, or their commissioners having power

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power to receive resignations, and grant new infeftments thereof, *in favours*, and for new infeftments of the same, to be made and granted to the said C. D. and his forefaids, in such due and competent form as effeirs, for payment of the sum of — Sterling money of feu duty, and performance of the several obligements and prestations after mentioned, and which are specially to be contained in the infeftments to follow hereupon; acts, instruments, and documents, upon the premises, to ask, take, and raise, and generally every other thing to do, which to the office of procuratory, in the like cases, is known to pertain, promising to hold firm and stable whatever my said procurator shall lawfully do or cause to be done, in the premises. Which house and yard above written, with the pertinents. disposition thereof before written, and infeftment

to follow hereupon, I bind and oblige me and my foresaids, with and under the express obligements, conditions, and prestations after written, and contained in the original contract of feu of the said subjects, to warrant to the said C. D. at all hands, and against all deadly, as law will. Moreover, I hereby *make* and *constitute* the said C. D. and his foresaids, my cessioners and assignees, *not only in and to* the foresaid contract of feu of the said house and yard, entered into betwixt the said ———, superior thereof, and (a) me, of date the ——— day of ———, with my inestment following thereon, in virtue of the precept of seisine therein contained, dated ——— registered ——— whole heads, articles, and clauses therein, conceived in my favours, with all that hath followed, or may follow thereupon, forever; but *also in and to* the rents, maills and duties, of the said house

house and yard, with the pertinents, from and after the term of —, being the term of his entry in all time coming: *Turning and transferring* the premisses from me and my foresaids, *to* and *in* favours of the said C. D. and his foresaids, whom I hereby surrogate and substitute in my full right and place of the premisses for ever: With full power to them to intromit with, uplift, and receive the foresaid rents, maills, and duties, use and dispose thereupon at pleasure, and, if need be, to call and pursue therefor, as accords of the law; and, upon payment, to grant receipts and discharges, and, in general, to do every other thing requisite thereanent, that I could have done myself before granting hereof; which assignation to the writs and evidents, I bind and oblige me to warrant at all hands, and against all deadly, as law will; and the foresaid assignation to the rents, maills,

mailles, and duties, from my own proper fact and deed, done or to be done in prejudice hereof; and to warrant, free, and relieve the said C. D. and his foresaids, of all feu-duties, and other obligations and prestations, due and payable forth of the said house and yard before disposed, preceding the said term of —, the said C. D. and his foresaids, always relieving me and my foresaids of the whole feu-duties and prestations contained in the said contract of feu on my part, from and after the said term of —, at which term his said entry commences, in all time coming: Likeas, it is hereby expressly provided and declared, that the said C. D. and his foresaids, shall be bound and obliged, as he, by acceptation hereof, binds and obliges himself, and his foresaids, to warrant, free, and relieve, harmless and skaithless keep, me and my foresaids, from payment to the
said

said —, and his foresaids, superiors of the said house and yard, of the sum of — money yearly, at the term of Martinmas, in name of feu duty, beginning the first term's payment of the same at Martinmas first, and so forth yearly in all time thereafter, with two Fasten-even hens yearly, at the usual term of payment, and doubling the feu duty the first year of the entry of every heir or heirs thereto, as use is, of feu-farm, allenary; and also doubling the feu-duty the first year of the entry of each singular successor therein, to which sum such entry is taxed, without any further composition; and compearing and answering at all other courts to be holden therein, by the superior or his bailies, when lawfully cited thereto, and obey the statutes thereof, under the pain of —, as an unlaw, or amerciament for each failzie; and binds and astricts himself, and
his

his forefaids, to the corn-mill of the barony of C. commonly called the Mill of C. and thereat to grind all their corn and malt. and to pay the multures used and wont, as the other inhabitants of the said town or village are in use to pay, and shall be liable in the like failzies as any other feuer within the same are in use to perform; and, in like manner, to free and relieve the said —, and his forefaids, of all public burdens, impositions, and other taxations, that are, or shall happen to be, imposed upon the said house and yard, with the pertinents, in time coming, from and after the said term of — allenary, and to be liable effeiring to their part and portion, in payment of the customs, and other exactions, that may be due and payable by the said town or village, as the other inhabitants thereof are and shall be in use to do; with and under which conditions,

ditions, obligations, and prestations particularly above expressed, the foresaid contract of feu, and this my disposition, are made and granted, and no otherwise; and I have herewith delivered up to the said C. D. my double of the foresaid contract of feu, and seifine following thereon, to be kept and used by him and his foresaids, as their own proper evidents, at their pleasure, in time coming; *consenting* to the registration hereof in the books of Council and Session, or others competent, therein to remain for preservation; and, if needful, that all execution necessary, in form, as effeirs, pass hereon, I constitute

procurators, &c.

Attour to the effect the said C. D. may be the more readily infest and seised in the foresaid house and yard, with the pertinents, I, by these presents, make, constitute, and ordain

and

and each of you, my bailies in that part, conjunctly and severally, specially constitute, commanding and charging you, that, on sight hereof, ye pass to the ground of the foresaid house and yard, or to any part thereof, and there give and deliver heritable state and seifine, actual, real, and corporeal possession of all and whole the foresaid house and yard, with the pertinents, lying as said is, by delivering of earth and stone of the ground of the same to him, or his certain attorney, in his name, bearer hereof, to be holden of the said —, and his foresaids, immediate lawful superiors thereof, in feu farm and heritage, as said is, for the payment of the feu-duty, and performance of the several obligations, conditions, and prestations before written, and contained in the foresaid contract of feu and seifine, and which are specially to be contained

contained in the seifine to follow hereupon; and this in nowise ye leave undone. The which to do, I commit to you my full power, by this my precept of seifine. In witness, &c.

If this disposition is not granted by the feuer himself, but by one of the persons assigned to the unexecute precept, and afterwards infest, at letter (a) instead of what is in the foregoing example, say, 'and — of date the — day of —. 'Item, a disposition and assignation of the 'said contract of feu by the said — in 'my favour, dated —, with power to 'me to obtain myself infest on the unexecute precept of seifine contained in the 'said contract of feu, with my infestment 'following thereupon, dated —, registered —, whole heads, articles,' &c. If there is a charter of confirmation got

on it, the assignation must be narrated therein, after the disposition.

If there is only a part disposed of several subjects feued together by one person, before the clause of registration, instead of 'and I have herewith delivered,' &c. there must be a clause obliging him to make the feu contract, and other writs above mentioned, or transumps thereof, forthcoming to the purchaser.

To make this right effectual, feifine is generally taken on the precept, and a charter of confirmation got from the superior, in order to free the subjects from the hazard of the casualities falling by the death or delinquency of the granter of the disposition; or resignation is made in the superior's hands in virtue of the procuratory of resignation, a charter of resignation got, and infestment taken on the precept

precept of seifine therein contained. The first method is now almost constantly followed in lands held of subjects; the other more frequently in those held of the crown. The person possessed of such disposition, if he procure confirmation, it draws back to the date of the investment on the precept, and is considered as having been a public right, and so secures from the casualties from that period; but, by the other method, the person granting the disposition is not divested of the fee till seifine upon the charter of resignation. By the first method, there is only the trouble and expence of seifine, and a charter of confirmation; but, by the other, there is that of resignation, besides that of the charter thereon, and seifine following on such charter. In lands held ward, before that holding was abolished, there was a necessity of following this last method, as dis-

positions of land so held contained no precept of feifine, lest the lands should have fallen under recognition, a casualty by which the fee returned to the superior, if the vassal sold and alienated the greatest part of it to a stranger without his consent; it did not fall if they were to be held of the superior by resignation, as such disposition was ineffectual without his sanction thereto, and the disponent not divested, as before observed, till investment on the charter in favours of the disponent.

Charter of Confirmation.

To all and sundry to whose knowledge these presents shall come; H. L. Esq; of M. superior of the house and yard underwritten, with the pertinents: Know ye me to have ratified, approved, and confirmed, as I hereby ratify, approve, and for

me,

me, my heirs and successors, perpetually confirm, a disposition, dated the — day of —, made and granted by A. B. in C. heritable proprietor of the house and yard thereby disposed to and in favours of (a) C. D. in E. his heirs and assignees (a), heritably and irredeemably, of *all and whole*, &c. (insert the subjects) lying within the parish of —, and sherriffdom of —, together with the obligation to invest, and precept of seisine contained in the said disposition, and instrument of seisine following thereon, in favours of the said C. D. dated the — day of —, and registrate in the — register of seisines kept at —, the — day of —, and that in the whole heads, articles, clauses, tenors, and contents, of the said disposition and investment; dispensing with the generality hereof, and declaring this present confirmation to be equally good, valid,

and sufficient, to all intents and purposes, as if the writs hereby in general confirmed, were herein particularly and verbatim insert. In witness whereof, &c.

*Charter of Confirmation, and Precept
of Clare Constat.*

If the disponsee has not procured charter of confirmation in his lifetime, when the heir comes to enter, he gets the disposition and infestment in favours of his predecessor confirmed, and the charter of confirmation ends with a precept of *clare constat* for infesting the heir, which comes in immediately before 'in witness,' &c. and the words, 'the now deceased,' will be necessary before the name of the person who received the disposition, at letter (a) in the charter; the precept begins thus:

'And

* And whereas, by the disposition and in-
 * ffeftment before confirmed, and other
 * documents produced to me, and by me
 * read, seen, and considered, it clearly ap-
 * pears, and is made known, that the said
 * deceased C. D. father of G. D. my lovite,
 * merchant in ———, died last vest and
 * seised, as of fee, at the faith and peace,
 &c. (as in the preceding precept of *clare*
constat, to the end, and clause of subscrip-
 tion in the same form.)

Charter of Resignation.

To all and sundry to whose knowledge
 these presents shall come. H. L. Esq; of
 M. superior of the house and yard under-
 written, with the pertinents; know ye me
 to have given, granted, and disposed, as I
 by these presents give, grant, dispoise, and
 perpetually

perpetuallly *confirm* to my lovite C. D. in E. his heirs and assignees whatsoever, heritably and irredeemably, *all* and *whole*, &c. (insert the subjects) with the whole parts, pendicles, and pertinents thereof, with all right and title which I have, or can pretend to the said house and yard, or to the rents, maills, and duties of the same; *which* house and yard, and others above disposed, formerly belonged heritably to B. C. held of me as superior thereof, and were disposed to the said C. D. by disposition, containing procuratory of resignation, dated the ——— day of ———, and by virtue of the procuratory of resignation contained in the said disposition, the said house and yard were duly and lawfully resigned in my hands, as immediate lawful superior of the same, by staff and batton, as use is, in favour, and for new infestments thereof, to be given

given and granted to the said C. D. and his heirs and assignees, but with and under the burden of payment of the yearly feu duty, and performance of the several obligations and prestations after mentioned, and which are specially to be contained in the infeftments to follow hereupon, as authentic instruments taken up on the said resignation in the hands of ——— notary public, of the date hereof, more fully bear; *to be holden*, the said house and yard, with the pertinents, of me, my heirs, successors, and assignees whatsoever, in feu farm, fee, and heritage, for ever, by all just meiths and marches, and ancient boundaries and divisions of the same; *giving* therefor yearly, the said C. D. and his forefaids, the sum of ——— money, at the term of Martinmas, with two Fasten even hens yearly, at the usual term of payment, and doubling the feu-duty

duty the first year of the entry of every heir or heirs thereto, as use is, of feu-farm allenary; and also doubling the feu-duty the first year of the entry of every singular successor therein, to which sum such entries are taxed, without any further composition therefor; and compearing and answering to all the courts to be holden therein, by me or my foresaids, or our bailies, when lawfully cited thereto, and obeying the statutes thereof, under the pain of —, as an unlaw, or amerciamment for each failzie; and being bound and astricted to the corn-mill of C. and thereat to grind all their corn and malt, and paying the multures used and wont, as the other inhabitants of the said town or village are in use to pay, and being liable in the like services as any other feuer within the same are in use to perform; and, in like manner, freeing and relieving

me,

me, the said H. L. and my foresaids, of all public burdens, impositions, or other taxations, that are, or shall happen to be, imposed on the said house and yard, with the pertinents, in time coming, and being liable effeiring and conform to their part and portion, of the customs, and other exactions, that may be due and payable by the said town or village, as the other inhabitants thereof are and shall be in use to do; and which prestations are specially to be contained in the infeftments to follow hereupon. Saving always my own right as superior, and the right of every other person, according to law. Attour, I command and charge you and each of you, my bailies in that part, specially constitute, by this my precept of feifine, that, on sight hereof, ye pass to the ground of the foresaid house and yard,

&c.

&c. (as in the precept of *clare constat*) leaving out the words, 'as heir foresaid.'

If the disponsee has not got resignation made, and charter and infestment thereon in his lifetime, the heir may acquire right to the unexecute procuratory by a general service, and make resignation; or he or any other person may acquire right to it by disposition and assignation, and resign, and in that case the assignation will fall to be narrated in the charter.

If the disponsee procures the charter himself, and is infest, a simple precept of *clare constat* to the heir will answer the end.

Clause of Novodamus.

Where there are any defects apprehended in the rights, or a great deal of casualities have fallen, at getting the charter

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ter from the superior there may be a clause of *novodamus* thrown in, which has the effect of an original grant as to the subjects contained in it, and a discharge of all casualities. It might be as follows, and come in after the dispositive clause, or before the words, '*to be holden,*' in the preceding charter of resignation.

' And moreover, for onerous causes,
' and other good and weighty causes and
' considerations me thereto moving, I
' hereby, *of new, give, grant, and dispone*
' to the said C. D. and his heirs and as-
' signees, heritably and irredeemably, all
' and whole, &c. (insert the subjects) with
' all right, title, interest, claim of right,
' property or possession, as well petitory
' as possessory, which I, my authors and
' predecessors, heirs and successors, had,
' have, or any ways may have, claim, or
' pretend thereto in time coming, or to

‘ the maills, farms, profits, and duties of
 ‘ the same, by reason of non-entry, relief,
 ‘ liferent, escheat, forfeitures, declarators
 ‘ of irritancy *ob non solutum canonem*, re-
 ‘ duction of infeftments, or any other
 ‘ cause or occasion, civil or criminal, pre-
 ‘ ceding the date of these presents; re-
 ‘ nouncing, transferring, and overgiving the
 ‘ same, with all action competent, or that
 ‘ might be competent to me, my heirs and
 ‘ successors thereupon, in favour of the
 ‘ said C. D. and his forefaids, in all time
 ‘ coming.’

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T I T. XII.

*Petitions, or Summary Applications to
Judges.*

THE legislature, aware that peace and concord could not long subsist in society, if individuals were allowed, at their own hands, to take satisfaction for non-performance of civil obligations, or to retaliate private injuries, have taken from the parties interested the power of obtaining redress by their own act and deed, unless in a very few cases; such as,

1. The right of self defence, if this indeed can be considered as falling under that description.
2. Interruption of prescription,

tion, (or of a person's establishing or acquiring a property or servitude upon the property of another, by possession for a certain length of time, as 40 years, without molestation); this interruption ought, where it can be got done, to be made in presence of a notary, and his instrument thereupon to be insert in a register appointed for the purpose. 3. Poinding of cattle trespassing upon one's ground for the damages done to the grafs, for half a merk Scots for each beast, and the expence of keeping them till these be settled; by act of parl. 1686, c. 2. The poindfold, or place into which these cattle are put, must be a place where they may have both grafs and water; and the poiñder must immediately acquaint the owner that he may relieve them. This poinding does not, like other poinding, transfer the property, and is only a right of retention or pledge

pledge till satisfaction shall be made; because these damages are generally too trifling to come before a judge. 4. The right competent to barons to hold courts for recovering rents due to them, and for performance of mill-services, which is the greatest jurisdiction can now be granted to a person having his lands erected into a barony; which was a right considered as competent by law to every proprietor of lands, whether having his lands erected into a barony or not. The persons possessed of this jurisdiction generally appoint their factor, or some other person, their bailie, with their whole judicative powers, as where the baron is himself the party, he cannot judge in person.

The smallness of the sums or trespasses, the urgency of some cases, and the distance and tedious forms of the courts of law in others, have rendered a summary method

378 *Petitions, or summary*

of application to certain persons as judges necessary in a variety of cases.—The smallest jurisdiction known in this kingdom, beside that of recovering rents, and enforcing performance of mill-services competent to all barons, is that which is reserved to persons who had their lands erected into baronies before the year 1747, with extensive jurisdictions, civil and criminal. By the jurisdiction act, 20th Geo. II. they have a power still reserved to them of judging in civil causes, where the debts and damages do not exceed 40 s. and in assaults, batteries, and smaller offences, punishable by a fine not exceeding 20 s. or putting the delinquent in the stocks in the day-time, not exceeding three hours; the fine to be recovered by poinding or imprisonment: But their power of imprisonment is clogged with so many conditions, as to amount nearly

to a prohibition. Few applications are at present made to these barons or their bailies in their judicative capacity; the civil and criminal causes competent to be judged in by them being generally brought before the justices of the peace, and their power of recovering their rents before their own baron court seldom exercised; for the proprietor generally for this purpose raises diligence on his tack, or applies to the sheriff of the county for hypothecation and sequestration of the stock and crop on the farm, and for warrant of sale thereof.

Justices of the Peace are, by 1617, c. 8. and 1661, c. 38. directed to judge in breaches of the peace, and in most of the laws concerning public policy. Any one of them may, by proper warrants of commitment, imprison delinquents in order to trial, or by a warrant to a constable (who is

is their proper officer), ordain suspected houses to be searched, and suspected persons to be brought before him, in order to their examination, or to give security for their good behaviour. They have power to compel workmen and labourers to serve for a reasonable fee; and they can condemn masters in the wages due to their servants. They are judges in several matters relating to the excise, and in the statutes made yearly with respect to the revenue; and also in offences against the acts for preservation of the game; and in matters relating to the highways, &c. in conjunction with the commissioners of supply, and trustees on the road acts. They are also judges in applications for aliment of bastard children. Their jurisdiction in civil causes is very undetermined: Thus a decret of the justices of the peace, for a legacy of L. 50, was reduced
by

by the Court of Session, 10th February 1756, *Fergus contra Ramsay*. By a decision of that court, 14th June 1769, *Millar contra Boyd*, they sustained a decret of the justices for grass-mail to nearly that amount. Probably the distance of courts in some places, and the expences of formal processses for matters of too little consequence to become the subject of litigation in the ordinary courts of law, may have directed to applications to the justices of the peace in some civil causes, particularly in causes *inter rusticos*; and the supreme courts frequently have, where the sentences were in themselves just and equitable, sustained them.

The method of proceeding is by summary application, and warrant granted thereon. If the person brought before a justice of the peace is accused of a crime, and there appears reason to believe him guilty,

guilty, the justice of the peace grants warrant for committing him to prison: If of threatening another person with bodily harm, if the person complained on cannot find caution, the justice may grant warrant for committing him to prison. The game-laws and statutes, empowering justices of the peace to judge in matters relating to the revenue, point out the method of proceeding in regard to them; which is sometimes by imprisonment, sometimes by poinding, and sometimes by summary warrant of distress of their goods and chattels. In matters of civil debt, where the sums are small, the justices of the peace sometimes ordain instant payment, or grant summary warrant to poind or imprison; and the justices of the county of Edinburgh have fixed *ten merks Scots* as the greatest sum for this method of proceeding: But in causes for civil debts

debts of greater extent, and even in matters of excise, it is usual to get precepts on their decreets, and to cause give a charge before poinding. Horning is not considered as competent on their decreets. There is an appeal from the proceedings of one or two justices of the peace to the justices met in their quarter sessions; whose sentences are liable to suspension or advocacy by the Court of Session, except in cases concerning the revenue, declared to be final by statute.

Two justices of the peace make a quorum in their quarter sessions.

When a warrant is granted by a justice of the peace in one county, and the person complained on goes into another county, on proof, by oath, of the handwriting of such justice granting the warrant, one of the justices of that county may indorse it, which will be of equal effect

fect in that county, as the original warrant would have been where granted.

The form of proceeding before magistrates of royal boroughs, is also more summary than that of other courts. Besides their jurisdiction in civil matters within borough, which is equal to that of the sheriff within the county, their jurisdiction extends to the preservation of the peace and police within the borough; indeed, the chief magistrate is generally in the commission of the peace. Their proceedings (which in every borough are a good deal regulated by practice) are a medium between that of the justices and the fixed courts of law. In some of these boroughs there are no particular days appointed for holding courts.—The person intended to be prosecuted is verbally summoned on 24 hours warning, and the execution

execution certified by the officer at the bar, a claim is lodged, each party appears *in propria persona*; is heard *viva voce*; and decret pronounced of that date. This is only the case in the small boroughs, where there are few or no writers; for in the larger boroughs, common civil causes are carried on with little more expedition than before other courts. After the days are elapsed for extracting, (unless a sist on a bill of advocation is intimated in court), the decret is extracted, or a precept obtained; and after a charge given, and the days elapsed, act of warding is got out, which is equal to a caption. Inhabitants of royal boroughs may, upon summary application, secure the persons of strangers for mens meat, horses meat, or other merchandise, for which they have no other security than their account-book, till they find caution to answer to any action to be

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brought

brought against them : But they lose this privilege by taking bond, or other security ; and it is not competent to the assignee of the creditor. Magistrates of royal boroughs have also a jurisdiction in the aliment or liberation of poor prisoners by the *act of grace*, after taken notice of.

The above mentioned jurisdiction within royal boroughs, is that properly belonging to the bailie court. But the dean of guild is also a magistrate of a royal borough, having a jurisdiction independent of the bailie court. He has the inspection of buildings, that they encroach neither on private property, nor on the public streets ; and he may direct insufficient houses to be pulled down : But the power of charging heritors of ruinous houses to rebuild them within year and day, and, in case of failure, of valuing and exposing the same to sale, is granted

by

by the 6th act, 3^d sess. 1st parl. K. Cha. II. made thereanent, to the provost and bailies, and so does not fall under the jurisdiction of the dean of guild. He has also a jurisdiction in certain matters with regard to merchandise, as inspecting weights and measures, that they be according to the standard. Most of these matters may be brought before him by summary application.

This being premised with respect to summary applications, I proceed now to give a few of the most common examples of these applications, with observations on these examples.

Petition for Warrant to apprehend a Person in Mediatione Fugae.

If there is just reason for a creditor to suspect that his debtor intends suddenly to

leave the kingdom, upon the creditor's making oath of such suspicion to a judge, he will grant warrant for securing him, till he find caution to answer to any action to be brought against him within six months: Where the sum is small, the application is sometimes made to a justice of the peace; where it is greater, it is more frequently made to the sheriff-depute of the shire, or steward of the stewartry, and the petition, and deliverance thereon, wrote by the sheriff-clerk, or steward-clerk, or by some of the procurators before the court; unless the debtor is to be found in a royal borough, in which case an application to the magistrates is commonly used. The variations in these different cases are too trifling and obvious to require any direction. The form of such *petition*, and interlocutors or deliverance thereon, is as follows.

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Feb. 5. 1785.

*Unto the Honourable the Justices of Peace
for the Stewartry of Kirkcudbright,*

*The Representation and Petition of A——
B—— in C——.*

Humbly Sheweth,

That C—— D—— in E——, in the parish of F. is owing to the petitioner one pound seventeen shillings and ninepence Sterling, conform to account herewith produced.

That the petitioner is credibly informed, and has good reason to believe, that the said C—— D—— is about to leave the country, and preparing to set off, without making payment to the petitioner of the foresaid sum, whereby the peti-

tioner is in danger of losing the same, which makes the present application necessary.

May it therefore please your honours to consider the premisses, and grant warrant to constables, and their assistants, to pass, search for, and apprehend, the person of the said C—— D——, wherever he can be found within this stewartry, and to incarcerate him in the tolbooth of N——, therein to remain, upon his own proper charges and expences, until he find sufficient caution acted in your honours court-books, that he will give suit and presence in any action your petitioner may have against him for the same.

According to justice, &c.

A — B —

——, *Feb.*

_____, Feb. 6. 1782.

Having considered the above petition, and seen the account therein mentioned, ordains the petitioner to depone whether he has been informed, and has good reason to believe, that C—— D——, complained of, is about to leave the country, as mentioned in the petition.

(The justice of peace signs this.)

Eodem die.

Compeared the petitioner, who being solemnly sworn and examined, *depones*, that he has been informed, and has good reason to believe, that the within designed C—— D—— is about to leave the country; and this is truth, as he shall answer to God.

(The petitioner and justice sign here.)

Eodem

Eodem die.

Having again considered this petition, with the deposition of the petitioner, finds, that the said C—— D—— is *in meditatione fugae*, and therefore grants warrant to

constables for this stewardry, with their assistants, to pass, search for, and apprehend, the person of the before designed C—— D——, wherever he can be found within the said stewardry, and to incarcerate him within the tolbooth of N——, therein to remain, upon his own proper charges and expences, until he find sufficient caution acted in the said justices court books, that he shall appear and answer to any action that shall be brought against him at the instance of the petitioner, before them, or any competent court, for the debt before mentioned. at any time within six months from the date

of

of the bail-bond, and attend all the diets of court thereanent, and appoint a domicile within the stewardry, at which he may be lawfully cited, and that under the penalty of ——— money; and grant warrant and *mittimus* to the magistrates of N——, and their jailor, to receive and detain the person of said C—— D—— accordingly.

(The judge signs this.)

Observe, *1mo*, This form will also answer for application to magistrates to secure the person of a stranger for meat or merchandise, with little variation, except narrating, that it is by law competent to do so.

2do, The example given is of an application for securing the person of a native: But a judge may arrest or secure the persons of such as have neither domicile nor estate

estate within his territory, even for civil debts. Though a soldier, or travelling merchant, may be subjected to the jurisdiction of a judge by a personal citation, yet a soldier cannot be arrested for a debt under L. 10, by stat. 27th Geo. II. c. 5. sect. 67.

3tio, The application is commonly made before raising action; but it may be demanded after the action is come into court, which will occasion a small variation.

The necessity of some kind of *meditatione fugae* warrants is obvious, and the foregoing is what is used in practice. But it is thought to be in many cases too severe and summary a method of proceeding; and that the judge should only cause bring the person complained of before him, to be there dealt with as he should see cause; as he might be able to instruct that the
debt

debt was extinguished, or secured, and might then have an opportunity of finding caution: And in case of his not giving satisfaction, by producing evidence of the extinction of the debt, or security of it, or finding caution, then, in that event, to send him to jail: For, if he is at first sent there, in terms of the warrant, he is not likely to find caution afterwards; and a person in the best credit and circumstances may be laid in jail by the malice of an individual. It is indeed feared these writs are sometimes used rather like captions, or acts of warding, to enforce payment, than from any fear of the debtor's leaving the kingdom. It is also thought, if the claim is not very clear, the judge ought to ordain the creditor to find caution for damages and expences, in case of failing to make it good. Follows bond of caution.

Bond

*Bond of Caution, judicio fisti, for a
Person complained upon as in medi-
tatione fugae.*

I, G—— H—— in J——, by these presents, *bind and oblige* me, my heirs and successors, as cautioner and surety acted in the court-books of the justices of peace for the stewartry of Kirkcudbright, for C—— D—— in E——, that he shall compear personally before the said justices of peace, or any of them, or any other competent court, and answer to any action to be brought against him within six months, at the instance of A—— B—— in C——, for the sum of one pound seventeen shillings and ninepence Sterling, contained in an account mentioned in a petition to the said justices, for warrant

to

to apprehend the said C—— D—— as
in *meditatione fugae*, dated the fifth day of
February last, and that he shall attend all
the diets of court thereanent, until the is-
sue of the said cause, under the penalty
of —— to be paid to the clerk to the
said justices of peace, for the use and be-
hoof of the said A—— B——; and I
consent to the registration hereof in the
books of the said justices of peace, that all
execution necessary, in form as effeirs,
may pass hereon; and thereto *constitute*

my procurators, &c. *In witness* whereof,
these presents, (written upon this and the
preceding page by W—— H—— in
C——) are subscribed by me at C——
aforesaid, the eighth day of February one
thousand seven hundred and eighty four
years, before these witnesses, J——

L l

M'C——

M'C—— in Little A——, and J——
H—— in C——.

G—— H——,

J—— M'C—— witnesses.

J—— H—— witness.

If the person complained on is a stranger, it will be proper, in the bond, immediately after the words *issue of the said cause*, to add, 'upon a citation at ——, 'which is agreed to be held a domicile, 'whereat he may be cited, under the penalty,' &c. and so on as above.

Neither bail-bonds, nor judicial ones, (ordained to be granted by a judge) require stamped paper. The blank before the word 'procurators,' (as before observed) is left for filling up the person's name who presents the bond for registration.

By the above bond of cautionry, or bail bond, the cautioner is obliged to produce

the

the person complained upon, or defender, at all the diets of court, if sought, till sentence, when he is liberate; but, by decision, 21st June 1776, *Cockburn* against *Inglis*, if the defender is still *in meditatione fugae*, a new warrant may be applied for. I have added a copy of the interlocutor or sentence pronounced in the case *Cockburn* against *Inglis*, shewing the method to proceed in a case of that kind.

Edinburgh, June 21. 1776.

“ On report of the Lord Gardenston,
 “ and having advised the memorials, find,
 “ that the cautioners, *judicio fisci*, are libe-
 “ rate from their suretyship, by producing
 “ the person of the debtor for whom they
 “ are cautioners at all the diets of court,
 “ when required, or decret being pro-
 “ nounced in the cause; but if, before
 “ pronouncing decret, application shall

" be made to the court, and evidence
 " brought that the debtor is still *in medi-*
 " *tatione fugae*, for the purpose of evading
 " personal execution on the decret when
 " pronounced, find, that, in such cases,
 " the judge may exact new caution for
 " the debtor's continuing within the king-
 " dom, under a proper penalty, even after
 " decret shall be pronounced, for pre-
 " venting his evasion of the law; and, if
 " the debtor refuse or neglect to find cau-
 " tion, the judge may commit him to pri-
 " son such limited time as shall appear
 " necessary; and remit to the Ordinary
 " to proceed accordingly.

" (Signed) Ro. DUNDAS, I. P. D."

In maritime causes, the judge-admiral,
 on application, grants warrant till caution
 be found, *judicio fisci et judicatum solvi*,
 (i. e. not only for the debtor's appearance,
 but

but for payment after decret is obtained;) but the person applying must give caution for the damages and expences he may be found liable in, in case of failing to make good his claim. The bond of caution for the person complained of may be to this purpose: A. (the cautioner) becomes bound and enacted in the books of the high court of admiralty as cautioner, *judicio sisti et judicatum solvi*, for B. in the action and cause intended and depending before the judge of the high court of admiralty, at C.'s instance, against the said B. Clause of relief. Registration for execution.

A person may be sued, in relation to an immoveable subject, before the judge of the territory where the subject lies, and cited on the Court of Session's letters in supplement, if he does not reside within the judge's territory: But, if he is residing

in another kingdom, the Court of Session is the proper court, and he is held as lawfully cited by a citation at the market-cross of Edinburgh, pier and shore of Leith. Where a foreigner has only moveables in this kingdom, if the creditor, in place of obliging him to find caution upon a *meditatione fugae* warrant, wants to attach these moveables, the Court of Session, or the judge-ordinary of the bounds, grant warrant, which passes of course, for arresting his moveable goods, which is termed *jurisdictionis fundandae causa*, and the creditor may thereupon bring his action for constituting his debt. But it is apprehended, in order to recover his money, he must afterwards, on his depending action, apply for and use a common arrestment, (termed, in contradistinction, *rei servandae causa*,) and pursue a forthcoming in common form.

*Petition for a Warrant to oblige one
to keep the Peace.*

*Unto the Honourable the Justices of the Peace
for the county of W.*

The Petition of A. B. merchant in N.

Humbly sheweth,

That C. D. farmer in E. has, for a considerable time bypast, had a groundless ill-will, malice, and prejudice against your petitioner, and has of late threatened, with oaths and imprecations, to bereave your petitioner of his life *.

That your petitioner has all imaginable intention of living quietly and soberly with his neighbours, and avoiding quarrels

* If the petitioner has been beat or bruised, it may be here mentioned.

rels of all sorts; but, as he thinks his life in danger from the wicked and malicious threats of the said C. D. and being ready to make oath that he dreads bodily harm of the said C. D. he is under the necessity of making application to your Honours, to the effect after mentioned.

May it therefore please your Honours, upon your petitioner's making oath as above, to grant warrant to constables to search for, seize, apprehend, and incarcerate the said C. D. till he find sufficient caution acted in your Honours court-books, to keep your petitioner harmless in all time coming, under the usual penalties of lawburrows.

According to justice, &c.

A—— B——

August

— Aug. 16, 1782.

Campeared the petitioner, who being solemnly sworn and examined, *depones*, That he dreads bodily harm of C. D. complained of; and this is truth, as he shall answer to God.

(The petitioner and judge sign this.)

Eodem die.

Having considered the above petition, with the deposition of the petitioner, therefore grants warrant to

constables for this county, to pass, search for, apprehend, and incarcerate the said C. D. within the tolbooth of S. till he find sufficient caution, acted in the court-books of the justices of the peace, to keep the petitioner A. B. harmless and skaitheless of him, the said C. D. in time coming, under the penalty of four hundred merks Scots, and

and grants warrant to the magistrates of S. and their jailor, to receive and detain the said C. D. accordingly.

(The justice of peace signs this.)

This is the method of proceeding used in practice in applications of this sort: But it is submitted if it is not too summary, and even contrary to law, to pass sentence without either hearing the person complained on, or allowing him time to find caution, till in prison. It will be observed, that the judges in all the different courts have a power of judging in regard to the public peace by virtue of their offices, whether in the commissions for the respective counties or not; and the method pointed out even to the supreme court of this part of the kingdom, is far from being equally summary; though certainly the greatest discretionary power

is

is and ought to be lodged in the supreme court. The form there used is, an application by bill, similar to the example of a petition given, on which a deliverance is written, granting warrant for letters of lawburrows to pass, or be issued. The letters of lawburrows are of the nature of an extract thereof, and the *will* annexed is, by act of parliament, directed to messengers, to pass and take the complainer's oath that he dreads bodily harm; and then to charge the person or persons complained on to find caution, within *six* days, if south of the Dee, and within fifteen, if north thereof: And if they fail, they are denounced, the letters registrate, and caption is then, and not till then, issued. Indeed, the similarity of the applications being almost in the very same words, the taking of the complainer's oath in both, and ordaining caution to be found for the same

same penalty, one would have imagined would sufficiently have pointed out the analogy.

Where the matter is even aggravated by the person complained on having beat the other, the justice of the peace, it is apprehended, ought to bring him before him, and to inquire into the truth of the fact, that he may fine or commit to prison; for the imprisonment, even though beating should be mentioned in the petition, cannot be supposed in any degree to proceed upon that circumstance, this not being the part instructed by the deposition.

In short, there appears neither law, reason, nor justice, for the present form of these warrants.—It is laid down in our law books, that the justices, or any one of them, may, by a warrant to a constable, ordain suspected persons to be brought *before him*, in order to their examination,

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or to give security for their good behaviour. It may be observed, that, since the Union, the powers of the Scots and English justices are the same, and they have their commissions exactly in the same stile: And it is laid down in the learned commentary on their law, that it is now an indispensable requisite to *summon* the party accused before he is condemned; where the author treats of *summary convictions*. And in the chapter which follows of *arrests*, it is said, “a warrant may be granted, “&c. in order to compel the person accused *to appear before them.*”——
“Warrant ought to be under the hand
“and seal of the justice; should set forth
“the time and place of making, and the
“cause for which it is made; and should
“be directed to the constable, or other
“peace-officer, requiring him *to bring the*
“*party, either generally before any justice*

“*of the peace for the county, or only before the justice who granted it.*”—All which, it is apprehended, is equally applicable to Scotland, except the *sealing* of the warrant; sealing being long ago laid aside in writings in Scotland, though anciently used.

Bond of Caution in consequence of the above.

I, F. G. in H. by these presents, enact, bind, and oblige myself, my heirs, executors, and successors, as cautioner and surety acted in the court-books of the justices of peace for the county of W. for C. D. farmer in E.; That A. B. in C. his wife, bairns, servants, and dependers, shall be harmless and skaithless kept of the said C. D. his wife, bairns, servants, and dependers, in their bodies, possessions,
goods,

goods, and gear, and nowise be troubled or mollened by them, or by any others of their causing, sending out, reset, assistance, or rathabitation, whom they may stop or let directly or indirectly, otherwise than by course of law and justice, in time coming, under the penalty of four hundred merks Scots; and consenting to the registration hereof, &c. (as in the preceding example, and on plain paper.)

If the person complained on is a nobleman, the penalty is 2000 merks; for a landed gentleman 1000; and others 400 merks; the half of the penalty, in case of contravention, to be applied to the fisk, and the other half to the party complainer.

Petition for a Warrant to hypothecate.

*Unto the Honourable the Sheriff depute of
the shire of W. and his Substitutes,*

*The Petition of J—— N——, Esq; of B.
proprietor of the lands after mentioned,*

Humbly Sheweth,

That S. F. at boat of N——, tenant of the ferry-boat thereof, houses, croft, corn and meadow land annexed, is due for the premisses fifteen pounds Sterling, as one year's rent of the same, at Whitsunday last, conform to tack, herewith produced.

That the crop and stock of black cattle, horses, and sheep, upon his possession, are by law subject to the master's right of hypothec for the said year's rent; and as there is danger the same may be put away, and attached by the diligence of creditors,

May

May it therefore please your Lordships to grant warrant for hypothe-
cating, sequestrating, and detaining
the crop and stock upon the said
lands for payment of the foresaid
rent, and such expences as you shall
please to modify, and afterwards to
sell the same by roup for that pur-
pose, and to grant such other aid
in the premisses as your Lordships
shall see proper.

According to justice, &c.

W ———, July 9. 1782.

Having considered this petition, and
seen the writs therein referred to, ordains
the same to be intimated to the before
designed S—— T——, by serving him
with a copy thereof, and of this delive-
rance, personally, or at his dwelling-place,
and him to lodge his answers thereto

M m 3

within

within six days after intimation, showing cause why the hypothecation and sequestration after mentioned should not remain and be proceeded in, in terms of law, with certification; and in the mean time grants warrant, and authorises

sheriff-officers, conjunctly and severally, with their assistants, to pass to the respective lands mentioned in the petition, and at the sight of, and by the advice of any two honest and skilled farmers in the neighbourhood, to hypothecate, sequesterate, and detain upon the said lands, as much of the said S. F.'s stock and crop upon his possession as will pay the petitioner the sum of fifteen pounds Sterling, as the year's rent thereof due at the term of Whitsunday last, with thirty shillings Sterling of expences; the said expences subject to the future modification of the court; and appoints the two persons

persons at whose sight, and by whose advice the sequestration shall be made, to subscribe the execution, to be returned by the officer thereanent; which execution shall specify the different articles of stock and crop hypothecated, with the value set on each article.

(The judge signs this.)

These applications have been so frequent for some years past, that no person is ignorant that the hypothec upon cattle is for a year, and must be made effectual in three months after the year expires, *i. e.* if the year is run at Whitsunday, it must be made effectual by application before the Lammas immediately following such Whitsunday, or if at Martinmas, before Candlemas. The corn and other fruits are hypothecated for the rent of the year whereof they are the crop, for which
they

416 *Petitions, or summary*

they remain affected, though the landlord should not use his right for years together.

*Petition for Aliment, or Liberation,
upon the Act of Grace.*

Where a prisoner for debt depones upon oath, before the magistrates of the borough, that he has not wherewith to maintain himself, the magistrates may, by 1696, cap. 32. set him at liberty, if the creditor, in consequence of whose diligence he was imprisoned, does not aliment him within ten days after intimation made for that purpose. This statute, which is usually called *the act of grace*, is limited to the case of prisoners for civil debts. No prisoner, therefore, can claim the benefit of it, who is committed either for not performing a fact in his power, or for not paying

paying a fine or damages arising from his own delict.

February 26. 1773.

To the Honourable the Magistrates of D—,

The Petition of A. B. in C.

Humbly sheweth,

That the petitioner stands incarcerated in the tolbooth of D—, at the instance of J. C. in S. upon letters of caption, dated and signeted 13th June 1766, for not payment of L. 10 Sterling of principal, and a fifth part more of expences of plea, contained in a decret obtained before the sberiff of D— on the 4th of March preceding.

That the petitioner is become so poor, he cannot aliment himself in prison, upon which he is willing to make faith in your presence,

presence, in terms of the 32d chap. and 6th session of King William's first parliament, entituled, "Act anent the aliment of poor prisoners."

May it therefore please your Honours to consider the premisses, and to take your petitioner's oath upon what is above represented, and to ordain the said J. C. to provide and give security for such aliment to the petitioner, as your Honours shall be pleased to modify, in terms of the said act.

According to justice, &c.

A—— B——,

D——, Feb. 26. 1773.

The magistrates ordain the petition to be served upon the creditor-incarcerator, and ordain him to lodge his answers, or objections thereto, with one of the clerks of

of this borough, within three days, with certification, &c.

(This is signed by one of the bailies.)

Upon this the creditor-incarcerator must be cited personally by an officer of court, if within the borough; if not, the petition and deliverance must be sent to a writer to the signet, to get out the Court of Session's letters in supplement, which pass of course in the same manner as a horning, or other diligence, and must be execute by a messenger; or intimation of the petition and deliverance by a notary-public, if equally convenient, will answer the same end. The sentence sometimes bears service upon the incarcerator, *or his known agent* in the borough where the prisoner is; but it is doubted how far this is good, if the incarcerator is in the kingdom.

The prisoner then presents his petition, with the execution of service, or intima-
tion,

tion, and a declaration by the town-clerk, testifying at whose instance he is incarcerated, and for what sum ; and at calling, if any person compear, they are allowed to see and object ; if not, the following interlocutor is pronounced.

March 4. 1773.

The magistrates having considered the petition, with the execution of service (or instrument of intimation) returned there-to, and finding no answers lodged there-against, ordain the petitioner to depone, *1st*, Whether or not he is able to aliment himself in prison ? *2^{dly}*, Whether, since his imprisonment, he has dilapidated, disposed of, or put away any of his goods, gear, or effects ? and whether he hath done any other deed in prejudice of the incarcerator, or his other creditors ? and at the same time ordain him to lodge a disposition *omnium bonorum*, in favour of
the

the incarcerator and his other creditors, in proportion and effecting to their several debts, and to condescend therein specially on his effects, and to lodge the vouchers of the debts owing to him, or condescend where the same are.

(Signed by the Provost or acting magistrate.)

Eodem die.

Compeared A. B. who being solemnly sworn and examined, *depones*, That he is not able to aliment himself in prison: That he has not, since his imprisonment, dilapidated, disposed of, or put away any of his effects, goods, or gear, in prejudice of his creditors. And *depones*, That he has no goods or gear, except his body-clothes, and some old bankrupt desperate debts, of which he shall to morrow execute a disposition, and lodge an inventory; and this is truth, as he shall answer to God.

(This is signed by the deponent and judge.)

N n

March

March 8. 1773.

The magistrates having seen the disposition executed by the petitioner, they, in respect thereof, and of his oath, modify an aliment to him of — shillings Scots, payable by the incarcerator, or others who detain him; and ordain the creditors to provide or give security for the said aliment within ten days, otherwise the magistrates will set the petitioner at liberty, in terms of the act of parliament founded on in the petition.

(Signed by the Provost or acting Bailie.)

This must also be intimated to the incarcerator.

—— March 20. 1773.

Compeared W. F. jailor in D. who declares, that there is no aliment consigned in his hands for the prisoner A— B—, and

and further declares, that having gone through the magistrates of D——, viz. R—— M—— provost, E—— W——, J—— M'W——, and R—— W——, bailies, and also A—— M—— and J—— M'K—— town-clerks, and made inquiry if any aliment was consigned in their hands by the incarcerator J— C— for the prisoner A— B—, agreeable to the magistrates act of modification upon his petition of the eighth of March instant, they all answered in the negative, that no aliment was consigned, nor security given for said aliment.

W— F— jailor.

Eodem die.

The magistrates having again considered this petition, with the instrument of intimation thereon, dated the ninth day of March instant, bearing the intimation

of the act of modification of the aliment to the petitioner, dated the eighth day of March instant, together with the declaration of W—— F—— jailor, above written; and finding no aliment provided or secured for the petitioner, they grant warrant to, and appoint W—— F—— jailor, to set the petitioner A— B— at liberty, in terms of the said act of parliament founded on in the petition.

E—— W——, B.

Disposition Omnium Bonorum, by a Person taking the benefit of the Act of Grace.

Know all men by these presents, me A. B. in C. Whereas I am incarcerated within the tolbooth of D. by virtue of letters of caption, dated and signeted the fifteenth day of June one thousand seven hundred

hundred and fixty-six, raised at the instance of J— C— in S. for not payment to him of ten pounds Sterling of principal, and a fifth part more of expences of plea, contained in a decreet obtained before the Sheriff of D—— on the fourth of March preceding, as narrated in said letters of caption; *and that* I am owing to the persons after named and designed, viz. (here take in the creditors names and designations) certain sums of money, conform to the vouchers and instructions thereof, in their own hands, of which sums I am not at present in capacity to make payment to my said creditors; and though I have applied for, and obtained the benefit of the act of grace, and am now to be liberated from said prison in terms of the said act, *it* is reasonable that, before my liberation, I should satisfy my creditors, so far as I can, of the sums I am rest-

ing them; *therefore*, I hereby *dispone, assign,*
and *make over* to, and in favours of, the
saids (here take in their names) my credi-
tors, their heirs and assignees whatsoever,
proportionally, and effeiring to their se-
veral sums due to them, all and sundry
goods, gear, debts, sums of money, house-
hold furniture, and all other effects per-
taining, or resting and owing to me by
any person or persons whatever, and par-
ticularly, without prejudice to the foresaid
generality, the debts and effects belonging
and owing to me (*a*), contained in a list
hereby referred to (*b*), with the whole
vouchers and instructions thereof, with
power to them, or any person whom they
shall appoint, to pursue for, recover, and
discharge the haill debts and effects here-
by disposed; and generally to do every
other thing in the premisses competent to
me to have done before granting this dis-
position,

position, which I oblige me to warrant from fact and deed only; *consenting* to the registration hereof in the books of Council and Session, or others competent therein to remain for preservation; and, if needful, that all execution necessary, in form as effects, pass hereon; and thereto constitute

my procurators. *In witness* whereof, I have subscribed these presents, (written upon this and the preceding page of stamped paper by X. Y. writer in D.) at ———, the ——— day of ———, before these witnesses, ——— and ———.

You may leave out the words betwixt (a) and (b), and in place thereof insert the particulars.

Application

Application for Sealing the Repositories of a Person dying or dead.

Vicious intromission has been before defined, under the title of *Testaments*, to be the unwarrantable intermeddling with the moveable estate of a person deceased, without the order of law, and to subject the intromitter in payment of the defunct's debts. It is not confined to the relations, but strikes against any person intromitting, because even strangers, when attending on dying persons, have frequent opportunities of intromission with their valuable moveables, which are more easily abstracted than heritage. By act of sederunt 23d February 1692, the repositories of a dying person are ordained to be sealed up, as soon as he becomes incapable of sense, by his nearest relations, and the
keys

keys delivered to the judge-ordinary, to be kept by him for the benefit of all having interest, till the friends be advertised to meet. In case of necessity, the relict or children, at the sight of the judge-ordinary, or two justices of peace, may take out so much of the money lying by the defunct, upon their receipt, as will defray the expence of the burial; or, if he dies in a house not his own, they must be sealed by the master or mistress of such house, and the keys delivered to the judge-ordinary, till the nearest relations be acquainted; and it is declared, if the relation, or master or mistress of the house, neglect to seal as aforesaid, they shall be holden as embezzlers or abstracters of the writs, evidents, money, or precious moveables of the person deceasing, or deceased.

In observance whereof, application is made to a judge to attend, who, with
some

some other respectable persons, see the repositories sealed; and, if necessary, the judge allows so much of the lying money to be taken as will defray the funeral expences. The application is sometimes a verbal one, sometimes in writing; and a certificate or attestation is generally made of their having done so.

*Certificate of having Sealed up one's
Repositories.*

At — Which day the desk and other repositories of G. D. in —, deceased, were sealed up in presence of A. B. one of the bailies of the borough of —, and in presence of the other persons after mentioned, requested to attend by C. D. brother of the said deceased G. D. and the key of the same left in the hands of the said bailie, for the benefit of all concerned.

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This v
M. N.

L. M.

M. N.

P. Q.

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Unto the

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That

deceased

This was done in presence of L. M. and
M. N. merchants, and P. Q. writer in
_____.

L. M. witness.

A. B. bailie.

M. N. witness.

P. Q. witness.

Or, if the judge cannot attend, a petition may be presented to him, stating the person's death, and praying to grant warrant to the clerk to attend and see the same done.

*Petition for warrant to sell the effects
of a person deceased, for payment of
deathbed expences and funeral charges.*

Unto the Honourable the Bailies of _____,

The Petition of _____,

Humbly sheweth,

That H. J. late _____ in _____, now
deceased, staid for some time in family
with

with the petitioner prior to his death, which happened in ——— last, and was at that time owing the petitioner sundry small sums laid out on his account during his last illness; and the petitioner has further paid, or become bound to pay, several articles relating to the said defunct's funeral expences. That, immediately upon his death, his repositories were sealed up at the sight of ———, his nearest relation, and, after the interment, were opened by warrant from your honours, and an inventory thereof taken at the sight of the said ———: That the said H. I. had also, at the time of his death, sundry articles of household-furniture and books, of which, with his body-clothes, an inventory was also taken at the sight of the said ———: That the debts due to your petitioner being preferable debts, he is entitled to have

fo

so much of the said effects sold as will pay
the foresaid sums and expences.

May it therefore please your Honours
to grant warrant to your clerk of
court, or his servant, to sell, by pu-
blic roup, as much of the said ef-
fects as will pay the aforesaid sum
and expences.

According to justice, &c.

O o.

TIT.

T I T. XIII.

*On Proceedings before Inferior Courts,
and the method of applying to the
Superior Courts for Review of their
Sentences.*

HAVING, in the preceding title, said
so much upon petitions, or sum-
mary applications to judges, and upon
the practice before justices of the peace
and magistrates of boroughs, I cannot
help observing, that the form of procedure
before the other inferior courts appears

also

also much more simple and easy than is generally imagined.

The libelled summons, or warrant for citing the person to appear in court, is made out by the clerk of court, or sometimes by the pursuer's procurator, and is signed by the clerk. It is executed by the officers of the court from which it is issued.

At the day of compearance, the libel and execution is given in to the clerk, and called; and, if the defender appears, he has till next court-day to give in defences.

Defences in themselves cannot be said to have any form: They begin with the title, "Defences for such a person." The prosecutor, and the person prosecuted, are all along called the Pursuer and Defender, and the judge addressed, Your Lordship. They naturally conclude with the defen-

der's hoping the judge will sustain the defences, and assoilzie them from the action; after which, the words, *In respect whereof*, &c. are added. These defences, it will naturally occur, may be various; they are generally divided into Dilatory and Peremptory. Dilatory defences do not enter into the cause itself, but relate to the form of proceeding, and therefore must be offered first, otherwise they will not be listened to; and of these declining the judge; for, if the defender propose any other defence first, it is a tacit acquiescence in the judge's jurisdiction and competency to the question. Inferior judges may be declined in questions concerning heritable rights, in questions where they or their near relations have an interest in the cause; or where they have given partial counsel. By 1681, c. 13. no judge, supreme or inferior, can vote in the cause

of

of his father, brother, or son, either by consanguinity or affinity; nor in the cause of his uncle or nephew by consanguinity. A deputy may be declined where the principal judge is a party, unless in a cause where he is authorised by express statute. The judge may be declined, if the defender does not live within the territory or district over which that judge has the right of jurisdiction; 40 days residence in the territory, however, founds jurisdiction; or, if he has lands in it, the Court of Session will, on application by bill, grant letters of supplement, to cite him before the inferior judge. If the defender has no fixed dwelling place, as a soldier, or travelling merchant, a personal citation is sufficient to found jurisdiction, and he cannot therefore decline it. Another reason of incompetency in the judge, on account of which he may be declined, is,

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that

that the same process, or another having a near contingency to it, depends before a supreme court, or a more competent judge, and this is called *lis alibi pendens*; but a prosecution at the instance of the Procurator fiscal, for the public interest, does not bar the private party injured from bringing his process for damages before any other competent court. These dilatory defences being discussed, if proponed, the other dilatory defences follow, and are those against the pursuer's person, that he has not a *persona standi in judicio*, as being a pupil or minor, and having no tutor or curator convened in the process; or in being a society not erected into a body corporate by charter. Thus, the trades of Saltcoats, having entered into a contract incorporating and obliging themselves to pay a certain sum annually to the boxmaster, and so much in case of absence;

sence; in a pursuit at the instance of the boxmaster against one who had retracted, for the fines, it was found they had no title to pursue as a corporation, and had no *persona standi in judicio*; Crawford *contra* Mitchel, 1st June 1761. A similar decision was given in an action at the instance of the mason lodge of Lanark *contra* Hamilton, 11th June 1730. Another dilatory defence is against the pursuer's title, as that, being executor, he has not confirmed; and in a case, Frezar *contra* Gib, decided 10th February 1784, the Court of Session were of opinion, that a total confirmation of the debt in question was necessary to be produced before extract. In this case, a partial confirmation of the goods of the defunct had been produced; then a partial confirmation of the debt sued for; but, on a petition to the court, with answers, a total confirmation of

of the debt sued for was thought necessary; as also, it is a good defence that all parties having interest are not called. After discussing these, if any of them apply to the case in hand, the relevancy of the libel may be disputed; or extinction of the obligation pled, (if the summons is founded upon one), by one or other of the ways of extinguishing obligations before taken notice of, under *Discharges*, &c.; or by prescription, which is, in this case, the loss of a right, by neglecting to follow it forth, or use it, during the time limited by law; for which see Table of Prescription; or any other defence may be stated, which arises from the law, and the nature of the case.

The pursuer takes this up till another court day to answer, and then produces
 “Answers for ———, pursuer, to
 “the Defences for ———, defender;”

in

in which, after endeavouring to obviate the defences, he concludes with hoping his Lordship will have no difficulty in discerning in terms of the libel, and finding the pursuer entitled to his expences ; and ends, as all these papers do, with “ *In respect whereof,*” &c. What is said by the defender, is “ Replies for ————, “ to the Answers offered for ————,” and ends with hoping the judge will sustain the defences, and assoilzie him. The judge sometimes allows another paper to be given by the pursuer, which is a Duply to the Replies ; and then the cause is advised ; and, if the libel is not proven by writs produced, he probably allows to each party a proof of the facts stated by them, and to both parties a conjunct probation ; and a day is assigned for proving, and a diligence got out for summoning the witnesses, which is executed by the officers belonging

belonging to that court; and upon producing the diligence and executions, and these being called, the witnesses have their depositions taken either in court, or at an hour and place fixed on. See next Title, as to who are admissible, and who are inadmissible, as witnesses. Where witnesses live at a distance, on application, commission will be granted for taking their depositions. When all the witnesses for both parties are examined, circumduction is granted, which closes the proof.

Proof by witnesses is not allowed in payment of any sum above L. 100 Scots, which must be proven by writ, or oath of party, by act of sederunt 8th June 1597; nor in gratuitous promises; nor in contracts where writing is essential to their constitution, or usually adhibited, as in the borrowing of money; and no debt or right, once constituted by writing, can be taken

taken away by witnesses. It is admitted to the extent of L. 100 Scots in payments, verbal legacies, and verbal agreements which contain mutual obligations. It is received, to the highest extent, in bargains relating to moveables, in facts performed in satisfaction, even of a written obligation. A bond is reducible on the head of fraud, on proof by witnesses. Intromissions with rent payable in grain may be proved by witnesses, and even intromission with the silver rent, where the creditor has entered into the sole possession of the debtor's lands.

Sometimes the pursuer refers the matter to the defender's oath, and this oath is sometimes qualified by special limitations restricting it. The qualities which are admitted by the judge as part of the oath, are called *intrinsic*; those which the judge rejects, or separates from the oath, *extrinsic*.

Where

Where the quality makes a part of the allegation which is relevantly referred to oath, it is intrinsic ; thus, because a merchant suing for furnishings after the three years prescription has taken place, must, in order to make the process relevant, offer to prove, by the defender's oath, not only the delivery of the goods, but that the price is still due ; therefore, though the defender should acknowledge, upon oath, his having received the goods, yet, if he adds that he paid the price, this last part, being a denial that the debt subsists, is intrinsic, since it is truly the point referred to oath. Where the quality does not import an extinction of the debt, but barely a counter-claim against the pursuer, it is held as extrinsic, and must be otherwise proved. The quality of compensation is extrinsic. A creditor in a holograph bond is not obliged, even after the

vicennial

vicennial prescription is elapsed, to prove that the debt still subsists, but simply that the bond was signed by the debtor; the quality of payment is, therefore, in this case, extrinsic, and resolves into a defence, being no part of the libel referred to oath.

One who sues on a debt, constituted neither by writing nor before witnesses, must refer not only its constitution, but subsistence, to the defender's oath; since the oath of the debtor, by which alone the debt can be proved, ought to be also effectual for a proof of its payment. The quality, therefore, of payment or satisfaction, must, in such case, be intrinsic, by the above mentioned rule. Yet a defender who, in his oath, admits the constitution of a debt, cannot get off by adjecting the quality of payment, where the payment ought, by its nature, to be vouched

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by

by written evidence. The observations upon this point apply, with equal force, to the case where the defence of payment is referred by the defender to the pursuer. Thus, if the creditor shall depose that the money he received was not in payment of the debt pursued for, but in consequence of a separate bargain, the quality is intrinsic, being really a denial of the point referred to oath; but, if he acknowledges he received a sum in payment, it will not avail him to add, that he had afterwards disbursed it on the debtor's account.

It is a general rule, that, wherever the alledgeance referred to oath relates to any fact, writ, or deed, wherein the alledger pitches only upon what makes for him, omitting the other points and circumstances, then it is proper for the deponent to express the whole tenor of the writ, bargain, promise, or fact, as well that

which

which makes against him as for him; as, if a person be pursued for an alledged bargain for delivery of victual or merchant ware, sold at the price libelled, if he depones it was true that the bargain was made, but with this condition, if the money was not delivered against such a time, the bargain should be null and void, and that the money was not delivered, or offered, at that time; or, if a claim of debt be offered to be proven by the defender's oath, and the defender swears, that the ground of debt was the price of goods which were either not at all, or not fully delivered, these are intrinsic qualities, because the qualities are inherent in the same fact or right, and are necessarily implied in the nature of the thing, and are a part of the bargain.

Sometimes the libel is partly proven by writ, and partly referred to the defender's

oath ; in which case a day is assigned for him to depone, and, if he fail, he is held as confessed.

It will be observed, that, in many of these cases, the defender, instead of deposing, defers it back upon the pursuer.

Where the proof is not quite full, the judge sometimes takes the oath of either party in supplement ; and, before taking their oath, or leading a proof, the judge may, if he see cause, order either of the parties to confess or deny any fact he thinks proper, either personally in court, or by a writing under his hand, which, if it should afterwards turn out otherwise, he is subjected in expences.

The proof being thus concluded, the judge advises it, and gives a sentence ; or, if there is a long proof by witnesses, appoints memorials, which are a full state of the matter in dispute, the proceedings

held,

held, the evidence adduced, and the arguments arising therefrom in favour of the person for whom the memorial is drawn. The word *Memorialist* is used instead of *Pursuer* or *Defender*; and, upon advising hereof, sentence is pronounced. If any of the parties is dissatisfied therewith, they may give in a reclaiming petition; this begins like any other petition; it narrates the bringing of the action, with the procedure thereon, and interlocutors, and endeavours from thence to show cause why the sentence should be altered, and prays the judge to alter his interlocutor of such a date, &c. The other party is entitled to see and answer, and then a decision is given. There is sometimes even a second reclaiming petition given in.

The process being thus concluded, after the elapse of a few days, it is extracted:

by the clerk; and, after the days of a charge are expired, diligence may be raised thereon as on a registered protest. That the defenders may not be tied to uncertain attendance at the will of the pursuer, if the pursuer shall at any time fail to appear to insist in his action, the defender may obtain protestation, and be affoizied from the instance, and the pursuer must summon him of new; but, if the pursuer appear before extracting the protestation, before doing which one court day must intervene, he may go on in his process, upon paying some trifle of protestation money.

It will naturally occur, that, in drawing these long papers, the person so employed must have the process; he gets it up the one court day, and returns it the next, or when it is wanted, with his additional paper; and then it is borrowed in the

the same manner by the other party; at which time they write a receipt into a book for it, kept by the clerk; and in case any of them keep it up too long, the judge will grant a warrant for incarcerating him till he return it. There is a book, called the Diet-book, in which all the interlocutors, appointments, and sentences, are marked, and which regulates the order of calling them.

If either of the parties thinks himself aggrieved by any interlocutor pronounced in the cause, or by the decision of the inferior court, he may, at any time before extract, apply to the Court of Session, by bill of advocation, signed by a writer to the signet, who must be furnished with a copy of the process, and instructed in the reasons why the cause is wanted to be advocated, to enable him to make out the bill. Upon intimation of an attested copy of

of the fist thereon, the inferior court cannot proceed without being guilty of contempt of authority. The fist must be produced in, and intimated to, the inferior court; for intimation to the opposite party, or his doer, is not sufficient. A copy of this bill may be marked for, and got by the opposite party at the bill-chamber, and answers given in, which may be followed by replies and duplies; it is then judged of by the Lord Ordinary, and either passed or refused; if refused, certificate is given out, and the process proceeds before the inferior court; or it is competent to the advocator to petition the whole fifteen Lords to review the sentence, who either pass or refuse the bill, and the same after-procedure takes place as when a bill is passed or refused by the Lord Ordinary: If the bill is passed, letters of advocation are expedited thereon by a writer to the signet, and

and pass under the signet; and the other party may be summoned thereon to appear in the superior court: Or, in case the advocator fail to summon, and the other party wishes to push the matter, he puts up protestation for it in the supreme court. Unless the advocacy is produced in ten days, the protestation may be extracted, and L. 10 Scots of protestation money charged for; or, the party who has put up protestation, may extract the letters of advocacy from the bill which is left at the signet, at signeting the letters of advocacy, and thus bring the cause into court; after which the cause is carried on nearly in the same manner as other civil actions. Sometimes the bill is refused at first presenting, and no list obtained; in which case, the inferior court proceed as if no such thing had been applied for. That the supreme court may not

not waste their time in trifles, advocacy is incompetent for any sum under L. 12. The principal reasons of advocacy are, incompetency, iniquity in the judge, or contingency of the process to one depending before a superior or more competent court.

If the decret should be got out and extracted, the person aggrieved by the sentence may apply to the Court of Session by bill of suspension, stating the wrong or injustice as the reason, which is likewise signed by a writer to the signet. Suspension may also be obtained of a bill and diligence following thereon, on just cause shown, upon application by bill of suspension. Intimation of a copy of the bill and sist, in a suspension, to the party is sufficient. The same procedure is had in the bill chamber as in advocations. If refused, certificate is got, and the diligence proceeds ;

proceeds ; or the suspender may petition the court to review the sentence. If passed, the suspender must, within fourteen days, find caution to pay or perform in terms of the charge, and for the damages and expences to be found due in case of wrongous suspending ; otherwise, on certificate of no caution being found, the diligence will proceed. The suspender may obtain a prorogation of fourteen days more to find caution, on payment of 2s. 6d. to the clerk to the bills. The bond of caution is written by the agent for the suspender. On caution being found, and received by the clerk, the letters of suspension are expedite, and the cause comes into court in the same manner as an advocation does. If the charger thinks himself secure without a cautioner, and wishes for dispatch, he may, before the suspension is expedite, apply to the

the

the Lords by petition, praying a remit to the Lord Ordinary to discuss the reasons on the bill, the desire of which petition will be granted: But the clerk to the bills is entitled to 4 s. Scots, and the keeper of the signet to the dues of signeting. This method is also competent in advocations.

Suspension may also be obtained against a person doing any thing unwarrantably, as building, impressing an apprentice, &c.; and an interdict is sometimes obtained along with the sist. The caution in this case is for damages and expences, in case of wrongous suspending.

Appeals in civil causes, (except from the Court of Session to the House of Peers), are now disused; the only one competent is of causes under L. 12, to the Lords in the circuit, by *statute 20th Geo. II. cap. 43. § 34.* whereby it is enacted, "That
any

"any person in Scotland aggrieved by
"any decree or sentence of any sheriff or
"stewart's court, or the court of any roy-
"al burgh, or burgh of regality * or ba-
"rony, or of any baron or other heritor,
"in any matter criminal, not extending
"to the loss of limb or demembration, or
"in matters civil, not exceeding L. 12
"Sterling, may appeal to the next circuit-
"court of the circuits, within which the
"said courts shall lie, so as no such ap-
"peal be competent before a final decree
"pronounced; and such appeal may be
"taken in open court at pronouncing
"such decree, or within ten days there-
"after, by lodging the same in the hands
"of the clerk, and serving the adverse
"party with a duplicate thereof, person-
"ally, or at his dwelling-house; or his
"procurator or agent in the cause; and
"in

* Regalities are now abolished.

“ in like manner the inferior judge, in
 “ case there is any conclusion against
 “ him; and such service shall be sufficient
 “ summons to oblige the respondents to
 “ attend at the next circuit court, which
 “ shall happen to be held fifteen days at
 “ least after such service; and the judges
 “ at such circuit shall cognosce and deter-
 “ mine such appeals by the like rules as
 “ the Courts of *Session* or *Justiciary* respec-
 “ tively may now cognosce and determine
 “ in *suspensions* *: But the said circuit
 “ court shall proceed in a summary way;
 “ and, if they find the reasons of appeal
 “ not relevant, or not instructed, or if
 “ they determine against the appellant,
 “ they

* This is to be understood of *suspensions* ex-
 pede and come into court, and of determining
 first the reasons in the appeal, and the relevancy,
 &c. as in *suspensions*; and not of the procedure
 on the bill, and in the bill chamber.

“they shall award costs, not exceeding
“the real costs *bona fide* expended; and
“their decree shall be final.”

This, so far as related to civil causes,
was only to continue for ten years; but
made perpetual by 31st Geo. II. c. ult.

The appellant, at entering his appeal,
must lodge a bond of caution with the
clerk to abide by the decision.

Though the foregoing may seem to be
a tedious procedure, yet, when it is con-
sidered that almost every possible case is
stated, it will occur, that such part of it as
may happen in one cause cannot be much;
and that there is very little form in the
papers. And it is somewhat surprising,
that men of learning and genius should
not sometimes appear in their own causes,
or draw their own papers in them; for
there is little speaking in these courts:

Qq 2.

And:

And whatever may be said of our laws being a study that would require more than a life, its general principles may be learned in little more than three months, the time allowed by Cicero for the study of the Roman law. A great part of what is necessary to be known is laid down in Mr Erskine's small Institute, or Principles of the Law of Scotland,—a book of only 5 s. or 6 s. price. The larger Institutes, Dictionaries of Decisions, and most of the other law books, are consulted rather as Dictionaries than studied. A man is always studious and attentive in his own cause, and makes up, by care and attention, what he wants in experience. Besides, a practitioner, who has much business, cannot get time to study every case, and the law respecting it, thoroughly.

I would not, however, be here understood to mean that procurators are unnecessary:

cessary: The greatest part of mankind are, and will always be, unable to write or speak so as to answer that purpose, or even to do justice to their thoughts, and will find it their interest to employ others who can do it better; and it is even hoped these observations may be of use to young practitioners.

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TABLE

TABLE OF PRESCRIPTION,

O R,

*The Time in which certain Rights are
Established against Challenge, and
others Lost, by not using the first,
commonly termed Positive, and the
other Negative, Prescription.*

Three Days.

BILLS must be protested in three
days after the term of payment, to
preserve recourse against the drawers and
indorsers.

Forty Days.

P. Inhibitions must be registrate in 40
days, by act of parliament 1581, &c.

2. Tenants

2. Tenants must be warned 40 days before Whitsunday, by act 1555 ; or get a citation in a removing 40 days previous to that term, by act of federunt 1756.

3. Persons residing 40 days, fix a domicil, and subject themselves to the jurisdiction of the judges in that place.

4. When a person enters heir *cum beneficio inventarii*, the inventory must be registered 40 days after given in.

Sixty Days.

1. Seisines, instruments of resignation *ad remanentiam*, renunciations, eiks to reversions, must be registrate in 60 days—1617, c. 16.

2. Summonses and executions of interruption, or instruments thereof—1696.

3. Granters of deeds affecting heritage, their living 60 days after executing thereof, removes any ground of reduction *ex capite lecti* (or on the head of death-bed.)

Six

Six Months.

1. Bills, after they fall due, prescribe in six months, as to summary diligence, if not protested and registrate in that time.

2. Ministers must be presented to vacant kirks within six months after a vacancy, otherwise the presbytery present *jure devoluto*.

Factors appointed by the Court of Session must, within six months after extracting their factory, make up a rental of the estate, and list of arrears due by the tenants, to be put into the hands of the clerk to the process.

One Year.

1. Marriage must subsist *year and day* to validate contracts or deeds executed in contemplation of it, unless there be issue of it within that time heard cry, or it be otherwise provided by the contract of marriage. The *day* is only in greater evidence

dence of the year being elapsed; and any part of the day being elapsed is sufficient.

2. Summonses must be called within the year.

3. Causes must be continued within the year to keep from sleeping.

4. A person entering heir *cum beneficio inventarii* must, within a year after the defunct's death, exhibit an inventory to the sheriff clerk of the shire where the lands lie, or, if other heritage, where the predecessor died; and, if the same is registered, his entry will subject him no farther than the value of the inventory—

1695, c. 24.

5. Denunciation must follow within a year after a charge of horning, otherwise a new charge is necessary.

6. Submissions in the common file, with a blank for the time of deciding, expire in a year, unless there is a power

to

to prorogate, and the same used within that time.

7. Apparent heirs have a year to deliberate whether they will enter to their ancestor's estate, called *annus deliberandi*.

8. Alienation of heritage by an apparent heir, within a year of the predecessor's death, is null, in so far as hurtful to the creditors of the predecessors—1661, c. 24.

9. Relict and children, or next of kin, confirming within a year, excludes vicious intromission.

10. Tutors and curators must put out minors money to interest within a year.

11. Factors appointed by the Court of Session must give in a scheme of their accounts yearly.

12. The said factors are liable for interest from one year after the term of payment of rents or debts, by act of sederunt, 31st July 1690.

13. Creditors

13. Creditors of a defunct doing diligence against his *executors* within a year after his death, preferred to creditors of his nearest of kin, by act 1695, c. 41.

Three Years.

1. Creditors doing diligence against *apparent heirs*, for their predecessor's debts, within three years of the predecessor's death, are preferable to the creditors of the apparent heir—1661, c. 24.

2. Servants fees, house rents, board, merchants accounts, and other the like debts, as workmens wages, alimentary debts, writers accounts, &c. prescribe in three years as to proof by witnesses, but may be proved after the three years by the writing or oath of the debtor—1579, c. 82. minority not excepted.

N. Each term's fee, house rent, or aliment, runs a separate course of prescription;

scription; but accounts only from the date of the last article.

It is thought a receipt for a partial payment obviates the plea of prescription as to the balance.

3. Actions of removing must be pursued within three years after warning, (minority not excepted), otherwise warning must be used of new—1579, c. 82.

Ejections and spuilzies as to violent profits, and proof by the pursuer's oath *in litem*—1579, c. 81.

Four Years.

Persons may be restored against deeds done to their prejudice in minority, if they insist within four years after majority, which time is called the *quadriennium utile*.

2. Wilful desertion for four years founds divorce upon that head, 1573,

c. 55.

c. 55. The pursuer must first raise action of adherence, which, in practice, is done on one year's desertion; but four years must elapse from the desertion to the decree of divorce.

Five Years.

1. Maills and duties due by tenants in the country prescribe in five years after removing.

2. Ministers stipends prescribe in five years.

3. Multures prescribe in five years.

4. Bargains concerning moveables, or sums of money, proveable by witnesses, (*i. e.* to the extent of L. 100 Scots), prescribe in five years.

N. The above four articles, by 1669, c. 9. unless proved by writ, or oath of party.

5. Arrestments on decreets prescribe in five years after sentence—1669, c. 9.

R r

6. Actions

6. Actions raised upon warnings, spuilzies, ejections, arrestments, or for ministers stipend, and others mentioned in said act 1669, must be wakened every five years, by 1685, c. 14.

7. In adjudications, if the debtor deliver a valid right, produce a progress, clear incumbrances, renounce the possession, and ratify the decret of adjudication of as much of his lands, in favours of the creditors, as are worth the principal, interest, and a fifth part more, in respect the creditor is obliged to take land for his money, (but without penalty), with the composition to the superior, and expences of infestment, decret will only go against these lands; and they are redeemable in five years after payment of these sums: As, in a summons of adjudication, this and a general adjudication are both libelled together, this is called *the legal* upon the

first

first alternative of an adjudication, and is established by act 1672, c. 19.

Six Years.

Bills, by act 1772, prescribe in six years as to the proof. They must thereafter be proven by the writ or oath of the debtor; and partial payments are pled in bar of the prescription. This act excepts minors and persons abroad.

Seven Years.

1. Citations for interruptions must be renewed every seven years.

2. No cautioner, or co principal, in a bond for money, is bound after seven years from the date of the bond, if there is a clause of relief, or a separate bond of relief intimate to the creditor, at receiving his bond, by 1695, c. 5. unless diligence has been used within the seven years.

3. A person cannot compete with one seven years in possession on a seifine, or

tack, though claiming under a preferable title, but must, in a formal process, first obtain the title of the person who has been seven years in possession declared void.

Ten Years.

1. When the person against whom adjudication is raised fails in the first alternative of the summons, a general adjudication goes out against his whole lands and heritage, for the principal, interest, and penalty, with the composition to the superior for entering the adjudger, and expences of infestment; the lands and others redeemable in 10 years; and this is the *legal* upon the *second* alternative of the summons of adjudication, by act 1672, c. 19.

2. Actions of count and reckoning betwixt minors and their tutors and curators, prescribe in 10 years after the majority

majority or death of the minor, by 1696,
c. 9.

Twenty Years.

Holograph bonds, missive letters, and subscription in books or accounts, not attested by witnesses, prescribe in twenty years, if no diligence is done, or document taken upon them within that time, unless the creditor shall thereafter prove the verity of the subscription by the debtor's oath, by 1669, c. 9.

2. Reduction of erroneous retours of heirs, if not pursued in 20 years, prescribes—1617, c. 13.

Forty Years.

1. All manner of rights and claims, as well moveable as immoveable, and actions relative to them, prescribe in forty years.

R r 3

2. Rever-

2. Reversions on a paper apart prescribe in forty years.

Registration of a deed does not interrupt the prescription.

Prescription, in general, does not run against minors, nor against wives.

Prescription does not run upon a bond but from the term of payment, nor upon a clause of warrandice till eviction.

TIT.

T I T. XIV.

*Of the Admissibility of Witnesses, and
of Depositions and Oaths.*

WHEN a proof is allowed in a process, if a list of witnesses is given in, or they are cited to appear before the judge, the opposite party, if there is any relevant ground of objection against any of them, is allowed to state it, which, with the answers to such objections, are considered by the judge. Country men (unskilled in the law) are also often named
commis-

476 *Of the Admissibility of Witnesses,*

commissioners for taking proofs, and it would be proper they knew whom to admit as witnesses, and whom to refuse. There was an enumeration of inadmissible witnesses in statute 2d of King Robert I.; but the reformation in religion, the abolition of the clans, and several other causes, have conspired to make it undergo very considerable alterations, so as to be at present a very imperfect rule.

Objections against the hability of witnesses arise, either, *1st*, from their state, with respect to age; *2dly*, from moral character; or, *3dly*, from connection with the party, that may create partial affection or undue influence.

And, as to the *1st*, pupils (*i. e.* males under 14, females under 12 years of age) are inadmissible. Females were formerly rejected as to bargains proable by witnesses, settling of marches, proving that
deeds

deeds were executed on death bed, proving the onerous cause of deeds; but, by our present practice, they are admitted in every case, unless there be some other legal objection to them.

2dly, Infamous persons, convicted by a judge of crimes by the law inferring infamy, are inadmissible; as also persons convicted of a crime that may infer a disregard to an oath, as known habitual liars, scoffers at religion; persons guilty of falsehood (*i. e.* using false deeds, &c.) or oppression; persons accepting of bribes, or concealing the offer of them; persons who have prevaricated, or deposed inconsistently; perjured persons; persons guilty of subornation of perjury (*i. e.* inducing persons to bear false witness); adulterers. But although, as above observed, persons convicted by a judge of certain crimes are inadmissible, yet, it is not every sentence
of

478 *Of the Admissibility of Witnesses,*

of a judge will have that effect; it must be a judge competent to the crime, and tried in the manner prescribed by law for that crime. Thus, in a criminal trial in 1773, *Brown and Wilson*, for murder, the pannels offered an objection to one of the witnesses, that he had been found guilty of theft, and sentenced to be whipt, by two justices; but the Court of Justiciary found, that no man could be deprived of his good name, unless it proceeded upon a previous conviction by a jury trial. The sentence of the Court of Session, declaring a person infamous, is sufficient, because they are considered in many cases as a jury, and also that of the Court of Justiciary, where the trial is by jury. The rule, that *nemo tenetur jurare in suam turpitudinem*, does not apply to slight offences, which are punished by a moderate fine, or short imprisonment, but is limited to

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more flagitious crimes, where the life, limb, liberty, or estate of the criminal lies at stake, or to those which infer infamy. Cases sometimes happen where other persons have acted unjustifiably in a matter, besides the party prosecuted, and are offered to be adduced; and as this is the law as to the party prosecuted, *non tenetur jurare in suam turpitudinem*, from a parity of reason, it will apply to persons who are thus *socii criminis*; but, where the offences are slight, &c. this is also over ruled in this case. Nay, it has been carried further; for they have been admitted in occult crimes, where there was a penury of witnesses, as forgery, and in treason.

3d, As to the objections arising from partial affection, and undue influence, persons are rejected as witnesses in the causes of certain near relations. Mackenzie and Stair seem to think, that the
being

480 *Of the Admissibility of Witnesses,*

being within the forbidden degrees as to marriage, makes one inadmissible. Mr Erskine says, that whom the law disallows as judges, on account of propinquity, it also disallows as witnesses; that is, father, brother, son, whether by consanguinity or affinity, and uncle and nephew by consanguinity; and mother, sister, daughter, mother-in-law, sister-in-law, daughter-in-law, aunt, and niece, as being in the same degree, fall consequently to be inadmissible. But, though one cannot be brought in behalf of his near kinsman, he may against him at the other party's instance. But wives and children cannot be compelled to give testimony against their husbands and parents; except as to the last, in a case of a pursuit for separate maintenance brought by the mother against the father, on account of harsh treatment, where there are no servants at the time,

or

or other witnesses to be got. It is no good answer to the objection of nearness of kin, that the witness is as near a relation to the adverse party. Though the law considers bastards as having no fathers, consequently, as no kinsmen, by the father, to any person; yet the decisions have been various as to their admissibility, being sometimes received, at other times rejected. Tutors and curators are inadmissible, *for* their minors; advocates and agents, *for* their clients; in the causes in which they are employed: Tutors, advocates, and agents, may, however, be brought *against* them; but the two last cannot be compelled to discover, upon oath, such secrets of their client's cause as they may have learned from himself. Persons having an interest in the suit are also inadmissible; as are menial or domestic servants.

482 *Of the Admissibility of Witnesses,*

In occult, or private facts, where there is a penury of unexceptionable witnesses, some of these disqualifications are overlooked, in so far as that their deposition is taken *cum nota*, *i. e.* to have such a degree of weight as the judge may think it deserves, though not so credible as that of other witnesses. Thus, domestic servants have been received as to things transacted within doors.

All witnesses, before making oath, must be purged of malice and partial counsel, *i. e.* that they neither gain nor lose by the event of the suit, nor have given advice how to conduct it; that they have not been taught or prompted how to swear; that they have got no bribe, or promise of bribe or good deed, from any of the parties; and that they bear no enmity or ill-will to either of them. But if any of the parties offer to bring present evidence
of

of a witness's partial counsel in any of these points, the examination cannot proceed, though the witness offer to purge himself by oath. The proof of bare expressions of ill-will is not sufficient. Where one offers a relevant objection against a witness, but cannot instantly prove it, it cannot stop the examination; but he must protest for a reprobator, *i. e.* that he may bring evidence of his partial counsel; and this he cannot do afterwards, unless he protest for it then.

Report of an Act and Commission.

At N——, the eleventh day of September, one thousand seven hundred and eighty-two years, *in presence* of J. M. writer in ——, *compeared* D. G. writer in E. as agent and doer for S. S. son of the deceased W. S. of R. and produced an

484 *Of the Admissibility of Witnesses,*

act and commission, dated the eighth day of August last, issued by the (a) Lords of Council and Session, in the suspension before them (b) at the instance of the said S. S. against B. C. in M. directed to the said J. M. named by the charger's doer for taking the proof mentioned in the said act and commission to be adduced by the said S. S. and required him to accept of the said commission, which he accordingly did, and made choice of W. G. school-master in N. to be his clerk, and took his oath *de fidei administratione*; where compared also the said B. C. with H. I. writer in —, as agent for him. Thereafter, the said D. G. produced diligence against witnesses, and execution thereof, dated the — day of September current, who were called.

This must be signed by the commissioner.

If

If the commission be from a sheriff, say, betwixt (a) and (b), "sheriff of —, in "a process before him," *pursuer* in place of *charger*, and *procurator* instead of *agent*. The form of the deposition is, *Compeared* (then follows the name and designation of the witness, if or not married, his age, about which last there is no occasion to be very particular; it is generally, "aged " ——— years and upwards,") who being solemnly sworn, purged of malice and partial counsel, and interrogate, depones, (here take in the matter deponed to). *Causa scientiae patet*. And this is truth, as he shall answer to God.

The deposition of every witness must begin and end as above, must be signed by the witness, commissioner, and clerk; and if any of the depositions consist of more pages than one, the foot of each page, as well as the end of the deposition,

486 *Of the Admissibility of Witnesses,*

must be signed. If the witness cannot write, there must be added, "and depones " he cannot write;" and it is signed by the commissioner and clerk, as the others; and after all the depositions add, " what " is contained on this and the ——— pre- " ceding pages, is a just and true report " of the foresaid act and commission."

And this is signed by the commissioner and clerk.

Regulations for Payment of Witnesses.

By act of sederunt, 21st December 1765, it is enacted, That all witnesses shall be entitled to an allowance of 1s. per day for their personal charges, and such witnesses as travel on horseback, over and above the foresaid allowance, shall be entitled to the additional sums following, viz. to the additional sum of 1s. 6d. Sterling for

and of Depositions and Oaths. 487

for each travelling day, and to the sum of 1 s. 2 d. Sterling for each day they shall be detained in court after their appearance upon the citation, till they are examined and dismissed; and that the number of travelling days shall be ascertained by a reasonable computation, according to the witness's place of residence; to be recovered by a summary warrant against the agent of the party adducer. Witnesses brought into court by a second diligence not entitled to any charges.

Oath of Verity upon a Debt.

At N——, the —— day of ——, one thousand seven hundred and eighty two years, *in presence* of G. H. Esq; of J. one of his Majesty's justices of the peace for the county of W. *compeared* J. A. in B. who being solemnly sworn and examined, depones,

488 *Of the Admissibility of Witnesses, &c.*

depones, That the principal sum of — pounds Sterling, and annual rent thereof since due, contained in a bill dated the — day of — last, drawn by the deponent upon, and accepted by O. P. in Q payable — after date, is a just, true, and lawful debt due to the deponent by the said O. P. and no part thereof paid, compensated, or extinguished * ; and the deponent has no other security therefor than the said bill. All this is truth, as he shall answer to God.

TABLE

* If there is a partial payment, say here, "except the sum of —, paid in part upon "the — day of —," as marked on the back of the said bill.

*TABLE of Fees in the Sheriff or
Stewart Courts, in Civil Cases, by
Act of Sederunt March 16. 1748.*

*N. B. The sums are in words in the act,
and Scots money ; but, for shortness and con-
venience, are here given in figures, and
Sterling.*

To Clerk and servants,

For registering each sheet of
hornings, interdictions, in-
hibitions, and lawburrows,
with their executions L. 0 1 4½

For an extract of a horning,
inhibition, interdiction, or
lawburrows, with the exe-
cution,

For

For the first sheet	L.	0	1	2
For every other sheet		0	1	0
For registering every sheet of bonds, instruments of pro- test, tacks, dispositions, in- ventories of heirs <i>cum bene-</i> <i>ficio</i> , and any other wri- tings	—	—	0	1 2½
For every libel, where the sum is under L. 40 Scots		0	0	6
Above L. 40 Scots	—	0	1	0
For every precept for sum- moning witnesses, and par- ties <i>pro confesso</i>	—	0	0	2
For letters of arrestment, or loosing thereof	—	0	0	10
For a petition, or answer		0	0	6
For writing a bond of cau- tionry	—	—	0	1 0
For receiving thereof		0	0	6
For producing an advocation		0	1	0

For

in the Sheriff, &c. Courts. 491

For writing depositions,

Every deposition of a party L. 0 1 0

Each of the first six witnesses 0 1 0

For every other witness 0 0 6

To the clerk for extracting
every precept,

Not exceeding L. 25 Scots 0 1 0

Exceeding L. 25, and not ex-
ceeding L. 40 Scots 0 1 8

Exceeding L. 40, and not ex-
ceeding L. 60 Scots 0 3 0

For writing and recording each
sheet of these decreets 0 0 6

To clerks and servants for ex-
tracting all decreets, acts, or
commissions, in causes ex-
ceeding L. 60 Scots in va-
lue,

For the first sheet — 0 2 6

For every other sheet — 0 1 6

But

But for every repeated sheet of
a decret, where any acts or
commissions have been ex-
tracted, only — L. 0 0 8

For every sheet of decreets of
transumpt — 0 1 2¹/₂

That every sheet of an extract
consist of 49 lines, at the
rate of 13 words in each
line, if wrote sheet-ways;
and of two pages, of 36
lines in each page, at the
rate of 9 words in each line,
if wrote book ways.

To the clerk, for every appeal
entered against any decret,
sentence, or judgment, for
recording the appeal, and
taking the bond of caution,
to be paid by the appellant 0 1 0
For

For a general service, to clerks
and servants, for drawing
the claim, and expeding the
service, and to officers and
witnesses for executing the
brieve at the market-crofs L. 0 15 0

For acts of curatory, and pro-
cess for making up tutorial
or curatorial inventories,
each sheet — — 0 5 0

For special services for draw-
ing the claim, expeding the
service, and giving the re-
tour or extract of the ser-
vice, including officer and
witnesses fees for executing
the brieves,

For the first sheet — 0 15 0

For every other sheet — 0 5 0

For seifines,

T t

1mo,

1^{mo}, The current price of the vellum or parchment for the time.

2^{do}, For the first sheet that it fills up of the clerk's protocol, as notary — L. 0 6 8

For every other sheet — 0 5 0

To the clerk for taking an infestment,

If taken at the distance of three miles, or under, from the clerk's office,

For an estate not exceeding

2000 merks of yearly rent 1 1 0

If exceeding 2000, and not

exceeding 5000 merks 2 2 0

If exceeding 5000, and not ex-

ceeding 10,000 merks 3 3 0

If exceeding 10,000, and not

exceeding 20,000 merks 4 4 0

And

And for any estate exceeding
20,000 merks — L. 5 5 0

And no more, whatever the
estate be.

If taken at more than three
miles distance from the
clerk's office, he is to be
paid, besides the above fees,

For every mile above three,
and not exceeding ten 0 5 0

For every mile exceeding ten 0 2 6

For sequestration of a bank-
rupt tenant's effects, such a
sum as shall be judged rea-
sonable by the sheriff,

The highest not exceeding 1 0 0

The lowest not under 0 5 0

For every person qualifying in
terms of law, and for the
certificate thereof — 0 2 0

And

T t 2

For

496 *Table of Fees*

For transacted processes and decreets, the half of what they would have amounted to if extracted.

Services of relicts to their terce to pay one half of special services; service of tutory, and of idiotry and furiosity, as general services; and that witnesses be paid for as in other processes.

To the officer for summoning a party or witness, or charging to make payment, or decret or precept,

To himself and witnesses to the execution — L. 0 0 8

But if the parties or witnesses cited or charged exceed three in number, and are within

within one mile of one another, only for each L. o o 6

Item, For each mile the officer and his two witnesses travel from the place of his residence, 6 d. more, provided always that the whole sum paid the officer, for himself and his two witnesses, do not exceed half-a-crown for one day, whatever be the number of miles, or of witnesses — — o o 6

To the bar officers that attend the court, for the oath of each party or witness o o 1

For executing a caption for reproduction of a process o o 6

The officer, for himself, witnesses, and apprisers, &c. to be paid for poindings at

the discretion of the party
employer, for which the of-
ficer assigns him the sheriff
fee.

*The Fees in Circuit Courts in Civil
Causes.*

For enrolling the causes in a
roll to be made up before
the sitting of the circuit
court — — L. 0 0 4

For every party and witness's
deposition,

To the clerk — — 0 1 0

To the macer — — 0 0 4

To the clerk,

For an extract of the Lords
sentence or judgment 0 5 0

For each person qualifying in
terms of law, and for the
certificate thereof — 0 2 0

Fees

Fees in Suspensions and Advocations.

Writers dues of drawing the			
bill—first sheet	—	L. 0	5 0
Every other sheet	—	0	3 0
Clerk to the bills, his fees at			
presenting bill of advocation	0	1	8
Ditto, his fees at presenting			
bill of suspension	—	0	6 1 $\frac{1}{2}$
If more complainers than one,			
for each complainer after			
the first, and under ten, one			
half merk Scots, or	0	0	6 $\frac{8}{12}$
If off a bill day, extra	0	2	6
Borrowing the bill when sifted	0	1	0
Making notorial copy—first			
sheet	—	0	1 6
Every other	—	0	1 0
Intimating, if no travelling, to			
the court, or to the party,			
and if no copy to make	0	2	6
			If

If copying, each sheet L. 0 0 8

A reasonable allowance for travelling.

Copy marked for, and got by the charger at the bill-chamber—each sheet — 0 0 6

Answers thereto, writers dues as for drawing a bill.

Clerk to the bills, his fees at presenting — 0 5 0

Borrowing — — 0 1 0

Replies, duplies, &c. writers dues, and borrowings, as before.

To the clerk for each 0 2 6

To Lord Ordinary's clerk for reading papers at advising, paid by the suspender or advocator if passed, by the other party if refused 0 2 6

Dues of passing the bill 0 3 6

Dues

Suspensions and Advocations. 501

Dues of writing bond of cautionry — — L. 0 2 6

— of receiving ditto 0 1 0

Expediting the letters, which are transcribed from the bill, and to the will, are only charged as copying, at 8 d. per sheet, and for the will is charged drawing an additional sheet — 0 3 0

Dues of signeting — 0 1 10

Putting up protestation 0 1 0

If the bill is refused upon answers, &c. for certificate 0 3 6

For ditto of no caution 0 3 6

If bill is refused with expences, for extracting decret of expences — — 0 2 0

If the Court is Petitioned,

To drawing memorial for lawyer to draw petition 0 10 6

To

502 *Table of Fees, &c.*

To lawyer a fee to draw petition	—	—	L. 2	2	0
To his clerks	—		0	7	6
To printing each sheet of eight pages 4to, besides for marginal notes	—	—	0	18	0
To making copy for the process, each two pages of writ	—	—	0	0	8
To clerks dues of ditto			0	4	10
To transmitting from bill-chamber to inner-house			0	1	0
To ditto back again after being advised	—		0	1	0
And the clerk to the bills charges double fees for passing, or certificate of refusal, if advised by the court.					

TABLE

T A B L E

OF

S T A M P D U T I E S.

EVERY skin or piece of vellum or parchment, or sheet or piece of paper, on which shall be ingrossed, written, or printed, any

Inland bill, promissory, or other note, draft, or order, under L. 50, after 1st August 1783, by act 23d Geo. III. pays a stamp duty of L. 0 0 6

Ditto of L. 50 or upwards 0 1 0

Foreign bills of exchange, *i. e.*

drawn in Britain on a fo-

reign country, and every

double or copy thereof 0 0 6

Bill,

Bill, note, draft, or order, payable on demand, under

L. 10 — — L. 0 0 3

Ditto on demand in Scotland, under 21 s. does not pay;— but by a later act, no duty is payable if under 40 s.

See Tit. on Bills.

Receipts for L. 2, and under L. 20, after 1st September 1783, by said act 23d Geo.

III. — — 0 0 2

Ditto for L. 20 and upwards 0 0 4

Ditto in full of all demands 0 0 4

See Tit. of Receipts and Discharges.

By act 12th Ann. cap. 9. made perpetual by 6th George I. there is imposed on all deeds not otherwise charged, a duty of 6d. to which a further duty of 1 s. is added

ded

ded by 30th Geo. II. 1757,
 of 1 s. by 16th Geo. III.
 1776, of 1 s. 6 d. by 17th
 Geo. III. 1777, and of 1 s.
 by 23d Geo. III. 1783, in
 all — — L. 0 5 0

Under which may be comprehended,
 Bonds and obligations for performance of
 deeds, excepting bonds for payment of
 money, to be after taken notice of;

Assignations, translations, retrocessions,
 and other conveyances of personal
 rights;

Dispositions of any moveable subject, and
 conveyances thereof;

Backbonds, declarations of trust, facto-
 ries, and procuratories *per se*;

Total discharges of personal bonds, obli-
 gations, and contracts for payment of
 money, or performance of facts and

U u deeds,

deeds, if on a paper apart, and also of
decreets and sentences;

Contracts of marriage;

Ditto of victual;

Ditto of excambion;

Charter parties;

And all other contracts and agreements
betwixt parties; (the tax of 6 s. on a-
greements, by 23d Geo. III. *not extend-*
ing to charge any agreement made in Scot-
land that shall be stamped with the duty
required on deeds; as observed in Tit.
First); it is thought, in Scotland, they
must be considered as deeds of impor-
tance, and requiring a stamp of 5 s. if
above L. 100 Scots.

Vendition of ships, and conveyances there-
of;

Presentations to churches, chapels, bur-
faries, schools, and other benefices,
deeds of mortification, and donations
delivered

delivered by parties in their own lifetime ;

Revocations by minors and by wives ;

Voluntary interdictions ;

Heritable rights and securities ; as

Dispositions ;

Feu-rights ;

Wadsets ;

Procuratories of resignation, both *in favorem* and *ad remanentiam* ; and

Precepts of seifine, when on papers apart ;

Reversions, regresses, renunciations, and grants of redemption, discharges of reversions ;

And all other rights and conveyances of and concerning such heritable securities, (excepting heritable bonds, as falling under the duty upon bonds after mentioned) ;

Real securities granted by one party to another, affecting the granter's estate, whether in city or country ;

Different provisions;
Tacks, leases, affedations;
Gifts or conveyances of casualties of superiority granted by subject superiors; and,
Grants of commissions, by subjects, to any office or employment in Scotland;
General dispositions;
Submissions are, in practice, written on paper paying this stamp-duty;
Decrees-arbitral, if written on a separate paper from the submissions, the more particularly, as by said act 23d Geo. III. every award (which is the same with a decree arbitral) is charged with 5 s.; but as they are, in practice, generally written on the back of the submissions in Scotland, it is thought this is sufficient, on account of the practice, in the same manner as instruments of seifine in England are indor-

fed

fed on their warrants, and therefore do not pay * ;

Indentures, in practice, pay as other contracts, besides the 6 d. per pound of apprentice fee under L. 50, and 1 s. per pound above it ;

Excepting indentures for binding poor parish and charity children apprentices, which pay no duty.

The following do not pay :

Testaments ; See *Tit. of Testaments* ;

Nomination of tutors and curators, as being of a testamentary nature ;

Judicial deeds in Scotland, as instruments of protest ;

Bail-bonds, or bonds of cautionry to answer for a crime, or *judicio fisci*, or in suspensions, loosing of arrestments, law-

U u 3 burrows,

* It has been decided lately, that a decret arbitral is valid written on the back of the submission, without paying duty.

burrows, or enactments made in court-books.

Inventory, or catalogue of furniture, goods, or effects, made with reference to any agreement, or for security of any person, (except inventories producible in ecclesiastical courts, and chattels distrained for rent in arrear) L. 0 2 6

Receipts and discharges of legacies left by will, or of moveable effects divided by statute, or custom, by act 20th Geo. III. under L. 20, pay — — 0 2 6

Above L. 20 and under L. 100 0 5 0

L. 100 and upwards, 20 s. or 1 0 0

And, by 23d Geo. III. not exceeding L. 20, an additional duty of 2 s. 6 d. which, with the preceding duty of 2 s. 6 d. is — — 0 5 0

Above

Above L. 20, and less than

L. 100, an additional duty

of 5 s. is — — — L. 0 10 0

L. 100, of 20 s. with the for-

mer duty of 20 s. is 2 0 0

And a like additional sum of

20 s. upon every other L. 100.

But this last act, imposing the

additional duty, does not

affect legacies, &c. left, or

falling, to the wife, children,

or grandchildren, of the tes-

tator, or person deceasing.

And, by 29th Geo. III. if to

the amount of L. 400, an

additional duty of 20 s. ; and

for every further L. 100, a

like additional duty of 20 s.

This last duty does not extend

to the wife, children, or

grandchildren. —

See Tit. of Receipts and Discharges.

Bonds

Bonds for payment of any sum or sums of money, by said 12th Ann. paid 6d.; by 30th Geo. II. a further duty of 1 s.; by 16th Geo. III. of 1 s.; by 17th Geo. III. of 1s. 6d.; amounting together to 4s.; and by 23d Geo. III. bonds for above L. 100 pay an additional duty of 5s.; for L. 500 and upwards, an additional duty of 10s.; the present duties then are,

Bonds below L. 100	L. 0	4	0
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Above L. 100, and below			
L. 500	—	—	0 9 0

For L. 500 and upwards	0	14	0
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Bail-bonds always excepted, as above mentioned.

Grant or letters patent of any honour dignity, promotion, franchise, liberty, or privilege, to any person or persons, body politic, or corporate, by said 12th Ann. a

duty

duty of 40 s.; and by 23d
Geo. III. an additional duty
of 40 s. is — L. 4 0 0

Admittance, or instrument for
admitting of any

Fellow of the college of physi-
cians,

Or of any

Attorney,

Clerk,

Advocate,

Procurator,

Notary,

Or other officer or officers in

any court or corporation,

(not being annual) yielding

not under L. 10 *per ann.* by

12th Ann. pays 40 s. and by

23d Geo. III. an additional

duty of 40 s. is — L. 4 0 0

The spirit of this act, so far as regarded procurators who practised in more courts than one, seems to have been, that they were liable to pay this duty at first admitting procurator; and, tho' admitted into more courts, were not liable for any further duty. It is believed this duty has not been paid by the procurators in Scotland, as few or none of them have ever taken out an extract of their act of admission; and every question in regard to this point is now put an end to, it is imagined, by statute 25th Geo. III. after taken notice of.

Beneficial warrant under his Majesty's sign manual, by 12th Ann. 2 s. 6 d. and by 23d Geo. III. (except warrants or orders for the service of the army, navy, or ordnance)

ordnance) an additional duty of 5 s. —

L. 0 7 6

Transfer of stock in any company, society, or corporation, by 12th Ann. 2 s. 3 d. and by 23d Geo. III. an additional 2 s. 3 d. —

0 4 6

Charter or seifine of lands holding burgage in Scotland, by 10th Ann. 2 s 3 d.; by 17th Geo. III. 1 s 6 d.;

by 23d ditto, 1 s. additional 0 4 9

Seifine upon any mortgage, wadset, heritable bond, alienation, or disposition; or upon any charter, precept of *clare constat*, retour, apprising, or adjudication of lands or tenements holding of any subject in Scotland, a like sum.

Charter of resignation, confirmation, novodamus, a charter upon apprising or adjudication,

adjudication, made or granted by such superior, or others as aforesaid, in Scotland, a like sum.

Seisines upon crown charters do not pay any stamp duty.

Principal or original instrument of surrender or resignation of any messuages, houses, lands, tenements, hereditaments, tithes, mills, fishings, and other heritable rights, or any of them, to be made to any of his Majesty's subjects, who are or shall be the superiors thereof; or to any city, town, burgh, or corporation; or to any magistrate, or others who have power to receive such surrenders or resignations, the like sum.

No more deeds than one can be written on the same sheet of paper, except the few relative ones before mentioned, of receipts or discharges on the back of unregistered obligations, or contracts, or decreets-arbitral, and the like.

By

By an act of 23d Geo. III. there is, from and after 1st October 1783, a duty imposed upon the entry of any burial, marriage, birth, or christening, in the register of any parish, precinct, or place in Great Britain, of L. 0 0 3

And, by this act, every parson, vicar, or curate, or other person having authority to make entries of burials, marriages, births, or christenings, who shall, after said 1st October 1783, enter any burial, &c. before the parchment, vellum, or paper, on which the entry of such register shall be made, shall have been duly stamped, every parson, &c. shall, for every such offence, forfeit the sum of L. 5.

Every parson, &c. is thereby vested with full power and authority, previous to the making the entry of any burial, &c. to demand and receive from the

X x

under-

By

undertaker, or other person employed about the funeral, or from the parties married, or from the parent of the child whose birth or christening is registered, or other person requiring the christening of such child, the sum of 3d.; and upon refusal, he, she, or they, shall, for every offence, forfeit and pay the sum of L. 5.

The church-wardens and overseers of every parish, or one of them, are to provide books for the registrating of burials, marriages, and christenings, with such stamps as by the act is directed, and shall pay for the same out of the rates under his or their management, and from time to time to receive back the money which shall be so paid, from the person authorised to demand and receive the same. And in the case of extra-parochial places, such book or books,

books, with such stamps as aforesaid, shall be provided from time to time, by the person whose duty it shall be to make entries of burials, marriages, births, and christenings.

Parsons, &c. shall not be subject in the penalty for an entry, by licence of three of the commissioners.

Does not extend to burials of persons from any workhouse or hospital, or at the expence of any charity, or to the birth or christening of any child whose parents receive parish relief.

But extends to quakers.

Receiver-general, and head distributors, or other persons appointed to receive the duty, to make an allowance to every parson, &c. or other person receiving the said duty, as a recompense for his trouble in accounting for the same, at the rate of 2 s. in the pound, out of

the monies by them regularly accounted for and paid to such receiver-general or head distributor.

Prosecutions for recovery of duties, and offences against the act, to be determined by a neighbouring justice. Appeal may be made to the quarter sessions; upon conviction, warrant may be issued for levying the penalty upon the goods and chattels of the offender, which shall be sold, if not redeemed within four days, surrendering to the party the overplus, if any.

The justices may mitigate penalties and forfeitures; reasonable costs to officers and informers being allowed above such mitigation; so as the mitigation do not reduce the penalties to less than a moiety of the penalties incurred, over and above the costs.

One

One moiety to go to his Majesty, his heirs, &c. and the other to the informer and prosecutor.

Defendants obtaining verdict for them, entitled to treble costs.

By statute 25th Geo. III. for and in respect of every warrant, mandate, or authority, given to any solicitor, attorney, notary, proctor, agent, or procurator, to commence, carry on, or defend any suit or prosecution in any ecclesiastical court, or in any of the courts of admiralty, or in any of his Majesty's courts in Scotland, or in any other court holding pleas, where the debt or damage shall amount to 40s. or more, there shall be charged a stamp duty of — L. 0 2 6

It will be observed, that it is not the intention of this act that the mandate be written on paper paying this stamp duty: The mandate may be written as

X x 3

formerly;

formerly; but the procurator or agent must, before commencing any action, for gain, fee, or reward, give into the officer appointed by the court for receipt and entry thereof, a memorandum, or minute, on paper duly stamped, of his authority, containing the names of the parties, of the court, and of the agent or procurator, &c.

No action to be staid, though the memorandums or notes should not have been properly entered.

Duty not to be charged to clients; and, if paid, to be repaid with costs.

Persons not immediately employed by the parties, may charge the duties to the solicitors, &c. for whom they act.

If a defendant is added after commencement of the action, a new memorandum is not necessary.

Not to extend to any suit for less than 40s.

Sixpence

Sixpence in the pound allowed to the clerk or officer entering the memorandum, by the receiver general.

By the said statute 25th Geo. III. every solicitor, attorney, notary, proctor, agent, or procurator, admitted, enrolled, or registered, in any ecclesiastical court, or in any of the courts of admiralty, or in any of his Majesty's courts in Scotland, or in any other court in Great Britain holding pleas, where the debt or damage shall amount to 40 s. or more, shall, previous to his commencing or defending any suit or prosecution, take out annually a certificate of such his admission, enrolment, or register.

For and upon every such certificate so taken out by any solicitor, &c. who shall reside in London, Westminster, the bills of mortality, or within the city of Edinburgh,

Edinburgh, there shall be charged a
stamp duty of — L. 5 0 0

For and upon every such certificate so taken by any solicitor, &c. who shall reside in any other part of Great Britain, there shall be charged a stamp duty of 3 0 0

From 1st November 1785; every acting solicitor, &c. shall annually deliver in a note of his name and residence in his proper handwriting, stamped with the proper stamp denoting the fore said duty, to the officer appointed by the judge of the court to enter the same, who is to certify the delivery thereof, and enter the same, on payment of a fee of one shilling.

Certificates must be renewed ten days before expiration.

Penalty

Penalty for refusing to issue, or improperly issuing certificates, L. 50, besides the damages sustained.

Persons residing 40 days in a year within the limits of the higher duties, are to pay the same.

Penalty on acting without certificate, or giving in a false place of residence, L. 50, and made incapable of maintaining action for recovery of fees, rewards, or disbursements, on account of carrying on or defending such action.

Persons having taken out certificates may act for others, who have also taken them out.

Person, under one certificate, may act in any other court in which he is admitted.

Persons entitled to conduct causes *ex officio* liable to the duty,—unless their offices are chargeable with land-tax.

Practice

Practice of courts not to be altered on account of this duty, or of that upon mandates, unless the court think fit.

This duty not to be (in any manner of way) charged to clients, and if paid, to be repaid with costs.

Penalties, in relation to any part of this act, to be recovered before the court of Session, Justiciary, or Exchequer, with costs.

Provisions with regard to former acts extended to this.

And, by 26th Geo. III. for every sheet of any deposition or depositions of witnesses in the Courts of Session, Commission of Teinds, Court of Admiralty, Commissary Court of Edinburgh, inferior courts in civil causes, or affidavit or deposition in Exchequer, a stamp duty of — — L. 0. 1. 0

And

And for every sheet of an extract, or attested copy of any deed, instrument, or writing, (except protests of bills under 40 s.) given out from any public register, a stamp duty of L. 0 1 0

Not to extend to charge with the duty any depositions for the public interest, nor in civil causes of L. 5, exclusive of costs, or causes in the poors roll, or extracts of decrees, other than such formal decrees of registration as are usually annexed to extracts of writings.

Sheet to consist of four pages of 36 lines, with 9 words in the line, or 1236 words, and not more, under the penalty of L. 10.

FINIS.

